

# **SEEKING THE BEST FORUM TO PROSECUTE GENDER-BASED VIOLENCE IN ARMED CONFLICT SITUATIONS IN AFRICA**

Submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in the School  
of Law, University of KwaZulu-Natal

July 2017  
Durban, KwaZulu-Natal, South Africa

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Protocol reference number: HSS/D467/015D

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## ACKNOWLEDGEMENTS

First, I acknowledge the Lord, God Almighty, for the opportunity to complete this PhD programme in South Africa. Thank you Father.

I acknowledge my supervisors Max du Plessis and Shannon Bosch. Thank you for the wonderful comments made, your patience in supervising my work and encouragement. I appreciate both of you, and I commend your supervision.

My appreciation goes to the UKZN Faculty of Law staff; always ready to assist and the librarians in providing materials often requested. Also, to David Donat Cattin and Marim Chahuneau of Parliamentarians for Global Action for providing the *Officiel de la Republique Democratique du Congo*, the document implementing the Rome Statute in the Democratic Republic of Congo's laws, when it was not yet readily available to be accessed. Also, to Dr Abimbola Lagunju for translating this document for me. To Daniele Perissi of Trial International for providing me with the DRC judgments and Oludayo Fagbemi of the Institute for Human Rights and Development in Africa for the ECOWAS judgment provided.

I also acknowledge my employer, Obafemi Awolowo University, Ile-Ife, for the permission to study in South Africa. To my colleagues and friends at the Obafemi Awolowo University, I say a big thank you all for the moral support and numerous phone calls for encouragement.

To members of my church in Nigeria and South Africa, you have been wonderful. Your prayers and support are greatly appreciated.

To Mr Churton Collins my editor. The personal attention and time are duly acknowledged.

To members of my family, I love you all, especially my husband Mr Olatubosun Ashiru for keeping the home front whilst I was away. I also take this opportunity to dedicate this thesis to my late parents, Mr and Mrs C. E. T. Nylander, who were willing to support my studying for a PhD in law many years ago.

God bless you all. Unto Him who is able to do exceedingly abundantly above all that we can ever ask or think.

## **ABSTRACT**

Sexual and gender-based violence (SGBV) has been a common feature of war, in armed conflict situations. This is particularly so on the African continent where sexual and gender-based crimes (SGBCs) are prevalent. Previously thought of as an unavoidable feature of war, it is now realised that SGBV is used as a weapon of war by perpetrators of these crimes. For years, SGBCs were marginalised and overlooked as they were not prosecuted as crimes in their own right. It was through the work of many feminists' striving to have these crimes recognised and prosecuted in their own right, that these crimes were included as crimes in their own right in statutes such as the International Criminal Tribunal for Rwanda and the Rome Statute.

Though SGBCs were included as crimes in their own right in the Rome Statute, this did not necessarily mean that these crimes were tried and when tried, there is no assurance that they would be successful prosecuted. As a result, it is necessary that SGBCs committed during armed conflicts are prosecuted at the international, regional and domestic levels so that the impunity gap for these crimes is closed. This thesis therefore considers the prosecution of SGBV committed during armed conflicts in Africa at the International Criminal Court (ICC), regional (proposed African Court of Justice and Human and Peoples' Rights) and domestic level (using the Democratic Republic of Congo as the case study). This is with a view to assessing whether these three forms of justice will bridge the impunity gap in bringing prosecutors to account and/or complement each other. The end result of this is to deter the occurrence of the above mentioned crime in Africa.

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## CHAPTER 1

### BACKGROUND AND OVERVIEW OF STUDY

#### 1.1 BACKGROUND TO THE STUDY – INTRODUCTION

Sexual and gender-based violence (SGBV) has been a common feature in armed conflict situations. Askin, a feminist scholar, in referring to impunity relating to rape and other sexual and gender-based crimes (SGBCs), notes how exceptional it is ‘to read in detail about one (war) without reading about the other (rape)’.<sup>1</sup> SGBV involves premeditated crimes committed by rebel forces and dissidents, as well as government agents, such as the local police, members of the victims’ community and peacekeeping forces,<sup>2</sup> regardless of their victim’s age, ethnic group or political affiliation. Civilian women and children in particular are intentionally targeted for SGBCs.<sup>3</sup> Although in recent years, scholars such as Sivakumaran have drawn attention to the fact that men and boys also experience SGBV during armed conflicts,<sup>4</sup> the crimes are generally viewed as crimes primarily committed against women and girls. Examples of SGBV committed against women and girls in armed conflicts include rape, sexual slavery and mutilation, forced nudity, enforced prostitution and causing unwanted pregnancies.<sup>5</sup> Previously thought of as an inevitable by-product of war or collateral damage to be tolerated, it is now realised that SGBV is used as a weapon of war by perpetrators of these crimes. It is used to instil fear in and humiliate

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<sup>1</sup> Kelly Dawn Askin, ‘Holding leaders accountable in the International Criminal Court for gender crimes committed in Darfur’ (2006) 1 *Genocide Studies and Prevention* 13 at 14.

<sup>2</sup> Rashida Manjoo & Calleigh McRaith ‘Gender-based violence and justice in conflict and post-conflict areas’ (2011) 44 *Cornell International Law Journal* 11. Catherine N Niarchos ‘Women, war and rape: Challenges facing the International Tribunal for the former Yugoslavia’ (1995) 17 *Human Rights Quarterly* 649 at 655.

Women have also been known to incite troops to commit acts of gender-based violence on victims. For example, in the Rwanda genocide, the former Minister for Family Welfare and the Advancement of Women, Pauline Nyiramasuhuko, incited troops and the militia to carry out rape against the Tutsi women. She was the first woman to be convicted for genocide and genocidal rape before the International Criminal Tribunal for Rwanda (ICTR). Kelly D Askin, ‘The quest for post-conflict gender justice’ (2002 – 2003) 41 *Columbia Journal of Transnational Law* 509 at 513.

<sup>3</sup> Though female combatants are also victims of SGBV, it is civilians who are mainly targets of SGBV.

<sup>4</sup> Sandesh Sivakumaran ‘Sexual violence against men in armed conflict’ (2007) 18 *European Journal of International Law* 253-276. Valerie Amos, former under-secretary for Humanitarian Affairs and Emergency Relief Coordinator ‘Remarks to the global summit to end sexual violence in conflict – ministerial dialogue on the hidden victims of sexual violence’ (12 June 2014) available at <http://reliefweb.int/report/world/under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-valerie-5> (accessed 2 January 2015) (pointing out that though sexual violence against men and boys is not a new phenomenon, it was only documented in 25 conflicts between 2000 to 2010).

<sup>5</sup> Men and boys also experience rape during armed conflicts. Other forms of SGBV which men and boys experience are castration, being forcibly stripped naked during detention, torture of their genital areas, forced to rape others including family members. Amos ‘Remarks to the global summit to end sexual violence in conflict’.

the enemy, bring shame and destruction to a community as an instrument of ‘ethnic cleansing’ and as a form of punishment.<sup>6</sup> SGBV is also used as a means of demonstrating power and control over victims and targeted communities.<sup>7</sup> As stated by Zaniab-Bangura, a former Special Representative of the Secretary-General of the United Nations, sexual violence in armed conflict had become ‘cost-free’ for perpetrators to rape their victims during armed conflicts.<sup>8</sup>

It is the victim’s gender that makes her especially vulnerable to those perpetrating these gender-specific crimes. Campanaro makes this point that ‘[i]n times of war, women and girls are targeted for sexual abuse on the basis of their gender, irrespective of their age, ethnicity or political affliction. By virtue of their gender, women become the target of one of the most serious violations that occur during war’.<sup>9</sup> In expressing his opinion on the violent nature of sexual violence committed against civilian women during armed conflict, Major-General Patrick Cammaert, a former peacekeeping commander of the United Nations (UN) in the Democratic Republic of Congo (DRC), stated that ‘[i]t has probably become more dangerous to be a woman than a soldier in an armed conflict’.<sup>10</sup>

SGBV has long-term effects on victims of these crimes, resulting in their needing medical and psychological help. The Chibok girls from north-eastern Nigeria, who were released from captivity by the terrorist group known as Boko Haram, are a recent example of victims of SGBV needing medical and psychosocial therapy. The psychosocial team comprises a

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<sup>6</sup> Manjoo & McRaith ‘Gender-based violence and justice’ Cornell Law School at 14 Resolution 1820 (2008) (19 June 2008) S/RES/1820 (2008) available at <http://www.refworld.org/docid/485bbca72.html> (accessed on 12 January 2015).

<sup>7</sup> Interview with Margot Wallstrom, former Special Representative of the Secretary-General on Sexual Violence in Conflict (11 Nov 2010) available at [www.un.org/apps/news/newsmakers.asp?NewsID=26](http://www.un.org/apps/news/newsmakers.asp?NewsID=26) (accessed 12 January 2015).

<sup>8</sup> UNSC ‘Security Council adopts text urging targeted sanctions against perpetrators of sexual violence during armed conflict’ (June 2013) available at [www.un.org/News/Press/docs/2013/sc/1043.doc.htm](http://www.un.org/News/Press/docs/2013/sc/1043.doc.htm) (accessed 14 January 2015).

<sup>9</sup> Jocelyn Campanaro ‘Women, war and international law: The historical treatment of gender-based war crimes’ (2000 -2001) 89 *Georgetown Law Journal* at 2557 - 2558. In the Rwandan genocide for example, Mullins writes that ‘[g]ender also (laid) at the core of why sexual violence was embraced as part of the genocide event.’ Christopher W. Mullins: ‘He would kill me with his penis, genocidal rape in Rwanda as a state crime’ (2009) 17 *Critical Criminology* 15 at 28. Sivakumaran ‘Sexual violence against men in armed conflict’ *The European Journal of International Law* at 253-276 (also arguing that men committed sexual violence against men because of their gender and also maintains that such violence committed against men is under-reported.).

<sup>10</sup> OHCHR ‘Rape as a weapon of war’ available at <http://www.ohchr.org/EN/NewsEvents/Pages/RapeWeaponWar.aspx> (accessed 6 January 2015).

Beth Van Schaack ‘Obstacles on the road to gender justice: The International Criminal Tribunal for Rwanda as object lesson’ (2009) 17 *American Journal of Gender, Social Policy & the Law* 361 at 363-364.

psychiatrist, psychologist, social worker and doctor.<sup>11</sup> Some of the well-known medical problems which victims of SGBV may suffer include post-traumatic stress disorder, insomnia, HIV/AIDS, gonorrhoea, traumatic fistulas and injury to their reproductive organs or infertility as a result of being raped repeatedly.<sup>12</sup> Women and girls may also experience unwanted pregnancies or medical complications when attempting to abort unwanted pregnancies.<sup>13</sup> Victims of SGBV are normally traumatised twice. First, from the violence suffered in the hands of their perpetrators, and then from the reactions of society and state, towards them.<sup>14</sup> For example, there is the shame and stigma which women suffer when rejected by their family members and communities or divorced by their husbands.<sup>15</sup> In the case of men known to have been raped, they are considered homosexuals and treated ‘like a wife’.<sup>16</sup> SGBV in armed conflict situations has been prevalent on the African continent. The genocidal conflict in Rwanda in 1994 and the 11-year civil war in Sierra-Leone which began in 1991 highlighted the effects SGBV had on civilians.

## 1.2 STATEMENT OF PROBLEM

To curtail violence committed against combatants and non-combatants in times of war, international humanitarian law (IHL) provides a set of rules which combatants should adhere to.<sup>17</sup> Though rape has historically been considered a criminal offence in national and

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<sup>11</sup> Of the 276 Chibok girls who were abducted, three were found or had escaped, 21 were freed in October 2016 and 83 in May 2016. *News 24* ‘Chibok girl refused to be part of release deal: Nigeria’ (May 2017) available at <http://www.news24.com/Africa/News/chibok-girl-refused-to-be-part-of-release-deal-nigeria-20170509> (accessed 12 May 2017). *CNN* ‘A rare inside look at the Chibok girls’ road to recovery’ (May 2017) available at [www.cnn.com/2017/05/11/africa/nigeria-chibok-girls-release-boko-haram/](http://www.cnn.com/2017/05/11/africa/nigeria-chibok-girls-release-boko-haram/) (accessed 12 May 2017).

<sup>12</sup> Manjoo & McRaith ‘Gender-based violence and justice’ at 16. Human Rights Watch ‘Seeking justice: The prosecution of sexual violence in the Congo war’ (March 2005) at 45 available at <https://www.hrw.org/sites/default/files/reports/drc0305.pdf> (accessed 6 January 2015).

<sup>13</sup> *Ibid.*

<sup>14</sup> UNSC ‘Report of the Secretary-General on conflict related sexual violence’ para 10 (S/2017/249, 15 April 2017).

<sup>15</sup> Manjoo & McRaith ‘Gender-based violence and justice’ at 16.

<sup>16</sup> UNSC ‘Report of the Secretary-General on conflict related sexual violence’ para 8 (S/2016/361, 20 April 2016). OHCHR ‘Report of the panel on remedies and reparations for victims of sexual violence in the Democratic Republic of Congo to the High Commissioner for Human Rights’ at 50 (2011).

<sup>17</sup> See for example, the Fourth Geneva Convention 1949 and the 1977 Additional Protocols to the Geneva Conventions.

international laws relating to armed conflicts and it is not condoned by IHL, gender-specific violence remains rife in armed conflict situations.<sup>18</sup>

Despite SGBCs occurring in armed conflict situations, these crimes were often passed over for prosecution by tribunals such as the International Military Tribunal (IMT) in Nuremberg, which elected to prosecute the perpetrators for generalised war crimes such as murder and torture. Gender-specific crimes instead were subsumed under the category of ‘other inhumane acts’.<sup>19</sup> Scholars such as Pillay put this down to the fact that such instruments were drafted by men who considered rape and gender-related crimes as an inevitable by-product of war or collateral damage to be tolerated and ignored.<sup>20</sup> Feminist scholars such as Copelon, on the other hand, have argued that for the most part, gender-based crimes are invisible and only become public when they form ‘part of the competing diplomacies of war’.<sup>21</sup>

As a result of the invisibility of SGBCs to the international community and courts, feminist scholars and activists, and various non-governmental organisations (NGOs), have actively sought to have gender-specific crimes such as rape, forced marriage, forced pregnancy and sexual slavery perpetrated against civilian women and girls recognised in international instruments and prosecuted as distinct or different crimes in their own right when perpetrated in armed conflicts. There has been progress in the body of international law relating to SGBV crimes committed in armed conflict situations: various UN reports,<sup>22</sup> human rights law, such as,

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<sup>18</sup> Rhonda Copelon ‘Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law’ (1994) 5 *Hastings Women’s Law Journal* 243 at 248. Patricia Viseur Sellers ‘The cultural value of sexual violence’ (1999) 93 *American Society of International Law Proceedings* 312 (where the writer outlines the development of the prohibitions of sexual violence). See also chapter 2 regarding the Lieber Code of 1863 which condemned rape as a capital offence and was adopted by states such as the United States. Hague Conventions and Regulations, art 46 where sexual violence is indirectly prohibited as a violation of ‘family honour’. Articles 27, 76 and 97 of the Four Geneva Conventions, art 78 of Protocol I, art 4 Protocol II prohibit rape, enforced prostitution, or any form of indecent assault, also calls for the special protection of women. However these crimes are couched as crimes against women’s honour or an outrage upon their personal dignity.

<sup>19</sup> See, for example, the *Statute for the International Military Tribunal for Nuremberg*.

<sup>20</sup> Navanethem Pillay ‘Sexual Violence: Standing by the victim’ (2009 -2010) 42 *Case Western Reserve Journal of International Law* 459 at 460 and 465.

<sup>21</sup> Copelon ‘Surfacing Gender: Re-engraving Crimes against Women in Humanitarian Law’ *Hastings Women’s Law Journal* at 243.

<sup>22</sup> See for example, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with commission resolution 1997/444 (26 January 1998) UN Doc.E/CN.4/1998/54 available at [www.ohchr.org/...>Your Human Rights>Women>SR Women](http://www.ohchr.org/...>Your Human Rights>Women>SR Women) (accessed 12 January 2015).

the Universal Declaration of Human Rights, (UDHR),<sup>23</sup> human right instruments, such as, the Vienna Declaration on Violence against Women 1993,<sup>24</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>25</sup> the Declaration on the Elimination of Violence against Women,<sup>26</sup> and UN resolutions such as 1325(2000),<sup>27</sup> 1888(2000)<sup>28</sup> and 1820(2008)<sup>29</sup> have been instituted to address such violent attacks. The UDHR, for instance, in its article 4 condemns slavery, whilst article 5 condemns ‘torture. . . cruel, inhuman or degrading treatment or punishment’.<sup>30</sup> These are sexual and gender-based acts which occur during armed conflicts. CEDAW, also known as the ‘Women’s Convention’, prohibits discrimination against women. Article 2 of CEDAW, for example, commits ‘state parties to pursue a policy of eliminating discrimination against women and to adopt legislative and other measures prohibiting all discrimination against women’. In its General Recommendation No. 19 given in 1992, CEDAW’s Committee defined gender-based violence in article 1 as ‘a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men’.<sup>31</sup> Its Recommendation further provides that discrimination against women ‘includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty’.<sup>32</sup> Article 7(c) of the committee’s Recommendation recognises that ‘[g]ender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms

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<sup>23</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 10 June 2018).

<sup>24</sup> UN General Assembly, Vienna Declaration and Programme of Action (12 July 1993) UN Doc. A/CONF.157/23

<sup>25</sup> *Convention on the Elimination of all Forms of Discrimination against Women*, Dec. 18 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33. The Convention entered into force on 3 September 1981.

<sup>26</sup> UN General Assembly, *Declaration on the Elimination of Violence against Women* (29 December 1993) A/RES/48/104 available at <http://www.refworld.org/docid/3600f25d2c.html> (accessed on 12 January 2015).

<sup>27</sup> Resolution 1325 (2000) (31 October 2000) S/RES/1325 (2000) available at <http://www.refworld.org/docid/3600f4672e.html> (accessed 12 January 2015).

<sup>28</sup> Resolution 1888 (2000) (30 September 2009) S/RES/1888 (2009) available at <http://www.refworld.org/docid/4ac9aa152.html> (accessed 12 January 2015).

<sup>29</sup> Resolution 1820 (2008). The UN in 2008 unanimously adopted resolution 1820(2008) recognising that ‘rape and other forms of sexual violence can constitute a war crime, a crime against humanity or constitutive act with respect to genocide.’

<sup>30</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 10 June 2018). Article 4 provides that ‘no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms’. Article 5 provides that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.

<sup>31</sup> Committee on the Elimination of Discrimination of Violence against Women, General Recommendation No. 19, U.N. Doc A/47/38 1993, (adopted on January 29, 1992), art 1.

<sup>32</sup> *Idem*, art 6.

under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include. . . the right to equal protection according to humanitarian norms in time of international or internal armed conflict’.<sup>33</sup> As Sellers notes, since General Recommendation No. 19 is considered as an ‘authoritative legal interpretation of CEDAW’, it thereby, recognises that CEDAW grants ‘women and girls the right to equal protection or non-discriminatory application of humanitarian norms in times of international or internal armed conflict and reaffirms the redress of war-related gender-based violence, such as rape, has a human rights dimension’.<sup>34</sup> With regard to resolutions of the United Nations, Resolution 1325(2000), for example, summarises principles protecting women’s basic rights by using ‘international humanitarian law, international human rights law and international criminal law’.<sup>35</sup> It acknowledges, ‘the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts’.<sup>36</sup> Resolution 1325(2000) ‘calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict’.<sup>37</sup> It also ‘emphasises the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls’, and in this regard ‘stresses the need to exclude these crimes, where feasible from amnesty provisions’. Resolution 1820(2008) expands on the scope of Resolution 1325,<sup>38</sup> by declaring ‘that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security . . . ’<sup>39</sup> The resolution also notes ‘that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or

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<sup>33</sup> *Idem*, art 7(c).

<sup>34</sup> Patricia Viseur Sellers *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretations* Women’s Human Rights and Gender Unit 1 at 28 available at [www.ohchr.org/Documents/Issues/.../Paper\\_Prosecution\\_of\\_Sexual\\_Violence.pdf](http://www.ohchr.org/Documents/Issues/.../Paper_Prosecution_of_Sexual_Violence.pdf) (accessed 14 January 2015).

<sup>35</sup> United Nations Security Council Resolution 1325 (2000) on Women, Peace and Security, ‘Understanding the implications, fulfilling the obligations’ available at [http://www.un.org/womenwatch/osagi/cdrom/documents/Background\\_Paper\\_Africa.pdf](http://www.un.org/womenwatch/osagi/cdrom/documents/Background_Paper_Africa.pdf) (accessed 9 June 2018).

<sup>36</sup> *Idem*, preamble.

<sup>37</sup> *Idem* para 11.

<sup>38</sup> Pamela Scully ‘Vulnerable women: A critical reflection on human rights discourse and sexual violence’ (2009) 23 *Emory International Law Review* 113 at 115.

<sup>39</sup> Resolution 1820(2008), art 1.



a constitutive act with respect to genocide'.<sup>40</sup> As with Resolution 1325, Resolution 1820 'stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes'.<sup>41</sup> Member states are called upon 'to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice'.<sup>42</sup> However, Scully in referring to Resolution 1820 (which would also apply to modern-day documents) points out that men and boys are not included in the provisions of Resolution 1820 as potential victims of SGBV.<sup>43</sup> She points out the necessity of including men (which would include boys) as victims of SGBV committed in armed conflicts, by stating that the omission would exclude the 'opportunity to develop more subtle understanding of why certain forms of violence are visited on certain individuals during wartime'.<sup>44</sup>

Also, the establishment of two *ad hoc* tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) by the United Nations Security Council (UNSC)<sup>45</sup> in the early 1990s, and the creation of the ICC in 2002,<sup>46</sup> saw rape recognised for the first time as a distinct war crime in its own right. The jurisprudence coming out of these tribunals has seen rape and other gender-related crimes recognised as distinct manifestations of some crimes against humanity and violations of article 3 in line with the Geneva Conventions, Additional Protocol II and instruments dealing with genocide. Since then, subsequent hybrid courts (including the Special Court for Sierra Leone (SCSL)<sup>47</sup> and the

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<sup>40</sup> Resolution 1820(2008), art 4.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Scully 'Vulnerable women: A critical reflection on human rights discourse and sexual violence' (2009) 23 113 at 117-120.

<sup>44</sup> *Ibid.*

<sup>45</sup> Under article 5(g) of the ICTY statute rape is explicitly listed as a crime against humanity. The ICTR statute explicitly lists rape under article 3(g) as a crime against humanity. Under article 4(e) the ICTR statute lists rape, enforced prostitution and indecent assault of any kind as a serious violation of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. It is estimated that in the ethnic cleansing which occurred in former Yugoslavia, between 10 000 and 60 000 Muslim and Croatian women were raped, whilst in the genocide in Rwanda in 1994 between 250 000 and 500 000 women were raped. See Mullins 'He would kill me with his penis: Genocidal Rape in Rwanda as a State Crime' at 16.

<sup>46</sup> Rome Statute to the International Criminal Court, UN Doc A/CONF 183/9, 17 July 1998, 2187 UNTS 90, 37 ILM 1002 1030, which came into force on July 1, 2002. Rome Statute, arts 7(1)(g), 8(2)(b)(xxii) and 8(e)(vi) which lists rape and other forms of SGBV.

<sup>47</sup> Statute of the SCSL, arts 2(g) and 3(e).



Extraordinary Court Chambers for Cambodia (ECCC)),<sup>48</sup> also specifically list rape in their statute and have prosecuted perpetrators for other SGBCs. It has also emerged from the jurisprudence of these more recent tribunals that men and boys were sexually assaulted in the context of detention or interrogation, and could also be classed victims of SGBCs, previously believed to only affect women and the girl child.<sup>49</sup>

Sadly, despite these positive steps towards direct prosecution of those committing acts of SGBV, the persistence of such crimes remains a troubling reality in conflicts in Africa. This is particularly so in states such as South Sudan, Darfur (Sudan),<sup>50</sup> the DRC and Nigeria. In 2013, for example, 15 352 incidences of SGBV were recorded by the government of the DRC, of which 860 cases were verified by the United Nations Organisation Stabilisation Mission in the DRC (MONUSCO).<sup>51</sup> The Secretary-General for the UN stated that this was a 13% increase on his previous report of sexual violence.<sup>52</sup> Margot Wallstrom, a former UN special representative on sexual violence in conflict, has dubbed the DRC ‘the rape capital of the world’.<sup>53</sup> Notably, by 2015, although MONUSCO and other organisations reported a decline in conflict-related cases, this was attributed to underreporting of cases and limited access to conflict affected areas.<sup>54</sup> In Nigeria, where SGBV has played an important part in the fight against terrorism between the government forces and the terrorist group known as Boko Haram, women and children have been the main targets. Testimonies from the Chibok girls freed from their abductors reveal that many of them were forced into marriage, raped randomly, forced to work as domestic slaves and used to carry ammunition in the front line.<sup>55</sup> Out of the 83 Chibok girls who ought to have been

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<sup>48</sup> Statute of the ECCC, art 9.

<sup>49</sup> In the war in Bosnia-Herzegovina, for example, civilian men prisoners in detention camps were forced to bite off other prisoners testicles, forced to perform sexual acts on the guards in the camps or on fellow prisoners, and castrated. R Charli Carpenter ‘Recognising gender-based violence against civilian men and boys in conflict situations’ available at

[www.genderandsecurity.researchhubsrc.org/gender-based-violence-against-men.../attachment](http://www.genderandsecurity.researchhubsrc.org/gender-based-violence-against-men.../attachment) (accessed 16 January 2015). In the DRC, there have been reports of homosexual and gang rapes occurring. Naomi Chan ‘Beyond retribution and impunity: Responding to war crimes of sexual violence’ (2005) 1 *Stanford Journal of Civil Rights & Civil Liberties* 217 at 218. OHCHR ‘Report of the panel on remedies and reparations for victims of sexual violence’ paras 13, 31 and 32.

<sup>50</sup> UNSC ‘Report of the Secretary-General on conflict related sexual violence’ at paras 45 and 50.

<sup>51</sup> *Idem* at para 27.

<sup>52</sup> *Ibid.*

<sup>53</sup> UN News Centre ‘Tackling sexual violence must include prevention, ending impunity – UN Official’ (April 2010) available at [www.un.org/apps/news/story.asp?NewsID=34502](http://www.un.org/apps/news/story.asp?NewsID=34502) (accessed 15 March 2016).

<sup>54</sup> UNSC *Report of the Secretary-General on conflict related sexual violence* para 34. MONUSCO reported that there were 637 conflict-related cases of sexual violence.

<sup>55</sup> *News 24* ‘Chibok girl refused to be part of release deal: Nigeria.’

released in May 2017, one of them refused to return as she was avowedly happily married with one of her abductors.<sup>56</sup> Her refusal to return is an example of the psychological effect of long-term captivity can have on a victim in which she might tend to develop sympathy for her kidnappers.<sup>57</sup>

Though tribunals like the ICC have jurisdiction to try perpetrators of such crimes, the ICC, a court of last resort, is limited to trying only the ‘most serious crimes of concern to the international community’.<sup>58</sup> Prosecuting SGBCs has been fraught with difficulties. First is the fact that the ICC can only prosecute a minute number of perpetrators alleged to have committed crimes within its jurisdiction. Two reasons given by Burke-White on the failure of ICC to provide worldwide accountability as expected are the unrealistic goals set by the court, and the limited funding provided by the Assembly of States, enabling only a maximum of two or three cases to be tried each year.<sup>59</sup> The limited capacity has had the obvious result that perpetrators of SGBCs in armed conflict are not deterred from committing these crimes, believing that they would be unlikely to be tried by the ICC<sup>60</sup> unless the crimes fell to be tried with other serious crimes like genocide. This could relegate SGBCs to a hierarchy of less serious crimes, making them, once again, invisible. The second reason was that, where states (non-state parties and state parties to the Rome Statute of the ICC) were not in agreement with the ICC as to the legality of the issue before the court, lack of cooperation from such states could prevent the ICC from bringing perpetrators of SGBCs to account for crimes committed. The dispute between the African Union (AU), which comprises a number of ICC member states,<sup>61</sup> and the ICC is an

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<sup>56</sup> *Ibid.*

<sup>57</sup> The term used for people in long-term captivity who develop sympathy for their kidnappers is ‘Stockholm syndrome.’ *Ibid.*

<sup>58</sup> Rome Statute, preamble, para 4.

<sup>59</sup> William W Burke-White ‘Proactive complementarity: The International Criminal Court and national courts in the Rome Statute of international justice’ (2008) 49 *Harvard International Law Journal* 53 at 54. The Office of The Prosecutor (OTP) in its 2016-2018 Strategic Plan forecasts nine preliminary examinations, one new situation under investigation, six active investigations, nine hibernated investigations, five pre-trial phase hearings, five-trial phase hearings and two final appeals. ICC-OTP, Strategic Plan| 2016-2018, 6 July 2015 at 24 available at [https://www.icc-cpi.int/.../070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/.../070715-OTP_Strategic_Plan_2016-2018.pdf) (accessed 11 November 2016).

<sup>60</sup> Schabas, for example, points out that the Lord’s Resistance Army was willing to negotiate with the Ugandan government when there was a threat that they could be prosecuted by the ICC. Thus, issuing arrest warrants assisted the conflict resolution in Northern Uganda. This would suggest that as long as perpetrators believe that the ICC has no interest in prosecuting them, they will continue to commit SGBCs. William A Schabas ‘Complementarity in practice: Some uncomplimentary thoughts’ (2008) 19 *Criminal Law Forum* 5 at 19-20.

<sup>61</sup> Out of the 122 states that are state parties to the Rome Statute, 34 of these states are African states. These 34 states are also member states of the African Union. ‘African Group of States – ICC’ available at

example of how this could happen. The AU has accused the ICC of selectively or impartially targeting African states in prosecutions.<sup>62</sup> This accusation is ongoing, although a number of the situations from Africa have been referred or reported to the ICC at the instance of or by the state in which the crime occurred.<sup>63</sup> The dispute between the two organisations came to a head with the indictment by the ICC Prosecutor of President Omar Al-Bashir, a sitting head of state from Sudan, charged with crimes of genocide, crimes against humanity and war crimes committed in Darfur.<sup>64</sup> Rape, as a crime against humanity, was a SGBC with which Al-Bashir was charged. Given that Sudan is not a party to the Rome Statute, the situation in this state was referred to the ICC Prosecutor by the UNSC, acting under Chapter VII of its Charter,<sup>65</sup> based on the report of the United Nations Commission of Inquiry on Darfur.<sup>66</sup> Accepting the referral based on the information before him, the prosecutor subsequently filed an application for Al-Bashir's arrest on July 14, 2008.<sup>67</sup> On March 4, 2009 an arrest warrant was issued by Pre-Trial Chamber 1.<sup>68</sup> The AU requested the UNSC to defer the proceedings brought against President Al-Bashir, in accordance with article 16 of the Rome Statute, due to the delicate peace processes that were ongoing in Sudan.<sup>69</sup> This request was ignored. The AU retaliated by instructing its member states at its 13th Ordinary Session held in Libya in July 2009 not to cooperate with the prosecutor's

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<https://www.icc.cpi.int/.../states%20parties/african%20states/.../african%20...> (accessed 20 January 2015). 'Member States| African Union' [www.au.int/en/member\\_states](http://www.au.int/en/member_states) (accessed on 20 January 2015).

<sup>62</sup> Coalition for the International Criminal Court 'Reflections on the African Union ICC relationship' available at [www.iccnw.org/documents/CivSocdocreAUSummit.pdf](http://www.iccnw.org/documents/CivSocdocreAUSummit.pdf) (accessed 22 January 2015). Tim Murithi 'The African Union and the International Criminal Court: An embattled relationship?' (2013) 8 *Policy Brief* 1.

<sup>63</sup> To date, those states which have self-referred situations to the ICC are Uganda, the Democratic Republic of Congo, Central African Republic and Mali. Situations and Cases-ICC available at [www.icc-cpi.int/.../situations%20and%20cases/...situations%20and%20c...](http://www.icc-cpi.int/.../situations%20and%20cases/...situations%20and%20c...) (accessed 22 January 2015).

<sup>64</sup> Murithi *The African Union and the International Criminal Court* at 1. IJR Policy Brief.

<sup>65</sup> This referral was made on March 31, 2005 under Resolution 1593 (2005). Article 13(b) of the Rome Statute provides for such a referral. It states that the Court may exercise its jurisdiction regarding crimes within its jurisdiction where '[a] situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.'

<sup>66</sup> This inquiry was a result of the UNSC acting under Chapter VII of its Charter and adopting resolution 1564 (2004). Under paragraph 12 of this resolution, the Secretary-General was requested to establish an international commission of inquiry to investigate international humanitarian rights violations and that of human rights violations. Resolution 1564(2004) (18 September 2004) available at

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1564\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1564(2004)) (accessed 22 January 2015).

<sup>67</sup> *Prosecutor v Omar Hassan Ahmed Al-Bashir* 'First warrant of arrest for Omar Hassan Ahmed Al-Bashir' (4 March 2009) ICC-02/05-01/09-1.

<sup>68</sup> *Ibid.*

<sup>69</sup> Assembly of the African Union Thirteenth Ordinary Session (1-3 July 2009) *Decision of the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) – Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII)Rev.1* at paras 3 and 9 available at <https://www.au.int/en/decisions/assembly-african-union-thirteenth-ordinary-session> (accessed 20 January 2015).

order for the arrest and surrender of Al-Bashir.<sup>70</sup> It has continued to urge its member states to ignore the arrest warrant, and also urged them to consider withdrawing as members of the Rome Statute.<sup>71</sup> Since the arrest warrant against Al-Bashir was issued, he has visited non-member and member states which have elected not to arrest and surrender him to face trial at The Hague.<sup>72</sup> Under the Rome Statute, member states have a duty to cooperate with the ICC in the investigation and prosecution of crimes within its jurisdiction.<sup>73</sup> Thus, member states are bound to arrest and surrender Al-Bashir to The Hague. A letter written by Human Rights and Civil Organisations supports the fact that refusal by states to cooperate with the ICC on the arrest warrant not only cultivates impunity but also promotes the continuation of SGBV. It also sends the wrong message to perpetrators. This suggests that there will always be an impunity gap at the ICC level in prosecuting perpetrators of SGBV committed in armed conflicts, where, in particular, state parties to the Rome Statute refuse to cooperate with the ICC in bringing perpetrators to justice. In summary, that ICC's success is dependent on the level of cooperation from states.<sup>74</sup>

In addition, states which have referred situations to the court have been accused of cooperating with the court for political reasons. For example, scholars such as Burke-White have suggested that the cases in the DRC were only referred to the ICC by its President Kabila for political gain.<sup>75</sup> A referral on the grounds of political gains is an abuse of the concept of complementarity as provided in the Rome Statute, as the ICC is intended to be a court of last resort when a state is unwilling or unable to genuinely investigate or prosecute a SGBV case

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<sup>70</sup> *Idem* at para 10.

<sup>71</sup> Although Kenya originally voted in favour of a motion to withdraw from the Rome Statute, it has not withdrawn from the ICC. Burundi officially informed the UN of its intention to withdraw from the ICC on 27 October 2016. 'Kenya Parliament votes to withdraw from the ICC' (5 September 2013) available at [www.aljazeera.com/news/africa/2013/09/201395151027359326.html](http://www.aljazeera.com/news/africa/2013/09/201395151027359326.html) (accessed 20 January 2015). 'Burundi officially informs UN of intent to leave ICC' available at <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims> (accessed 10 February 2017).

<sup>72</sup> Non-member states which Al-Bashir has visited, for example, are China, Egypt, Ethiopia, Iran, Iraq, Eritrea, Kuwait, Libya, Qatar, Saudi Arabia and South Sudan. Example of member states visited are Chad, Congo, Djibouti and Nigeria. 'Al-Bashir pressured over 'heinous crimes' *IOL* (5 March 2014) available at [www.iol.co.za/news/.../al-bashir-pressured-over-heinous-crimes-1.16565](http://www.iol.co.za/news/.../al-bashir-pressured-over-heinous-crimes-1.16565) (accessed 19 January 2015).

<sup>73</sup> Rome Statute, arts 86 -87

<sup>74</sup> Valerie Oosterveld, Mike Perry and John McManus 'The cooperation of states within the International Criminal Court' (2001) 25 *Fordham International Law Journal* 765 at 768.

<sup>75</sup> Burke-White 'Complementarity in practice' at 564. See also article by Nouwen and Werner where the same suggestion was made about Uganda. Sarah Nouwen and Wouter Werner 'Doing justice to the political: The International Criminal Court in Uganda and Sudan' (2011)21 *European Journal of International Law* (2010) 941 at 941-965.

occasioned by armed conflict.<sup>76</sup> Equally, the ICC has been accused of not encouraging states to fulfil their obligation of investigating and prosecuting crimes, but has rather used various other means to attract cases for prosecution before the court.<sup>77</sup> As Burke-White suggests, this could undermine the purpose for which the court was established and undermine accountability.<sup>78</sup> Taking Burke-White's views further, although the purpose of the ICC is to bring perpetrators of international crimes to account, its credibility would always be questioned once it is considered to be a court which engages in political issues. This could affect the credibility of its evidence and judgments, despite having achieved its aim of bringing perpetrators to account.

Apart from the above reasons, though the ICC was successful in prosecuting one case relating to SGBV committed in armed conflict since it started operating,<sup>79</sup> this case has been overturned by the Appeals Chamber. With its Policy Paper on Sexual and Gender-based Crimes, the ICC has however, tried to avoid repeating its past mistakes.<sup>80</sup> The ICC finds it difficult on its own to bring perpetrators of SGBV committed in armed conflict situations to justice. It is, therefore imperative to bridge this impunity gap at the prosecutorial level by also exploring prosecutions at the regional and domestic levels, to combat impunity of SGBV committed in armed conflicts in Africa.

### **1.3 REASONS FOR CHOOSING THIS TOPIC AND AIMS OF THE STUDY**

It has taken feminist scholars and activists, as well as NGOs over 40 years to get international law to recognise and prosecute SGBVs committed against women under the banner of war crimes, crimes against humanity and genocide. This breakthrough arose in response to the atrocious crimes committed in the former Yugoslavia and Rwanda, which caught the media's attention and thus, prompted the Security Council to act in exercising its powers under Chapter VII of the United Nations Charter. The International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and the ICTR) were established in 1993 and 1994 respectively to try perpetrators for crimes considered to be the most serious crimes of international concern and

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<sup>76</sup> Rome Statute, art 17.

<sup>77</sup> Burke-White 'Proactive complementarity' at 55.

<sup>78</sup> *Idem* at 56.

<sup>79</sup> See *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment pursuant to article 74 of the Statute' (21 March 2016) ICC-01/05-01/08.

<sup>80</sup> *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para 23 available at [www.icc.cpi.int/.../OTP-Policy-Paperp-on-Sexual-and-Gender-Based-Crimes](http://www.icc.cpi.int/.../OTP-Policy-Paperp-on-Sexual-and-Gender-Based-Crimes). (accessed 25 October 2016).

constituting a threat to international peace and security.<sup>81</sup> These two *ad hoc* tribunals paved the way for the drafting of the Rome Statute,<sup>82</sup> which also provides for the prosecution of additional gender-focused crimes such as sexual slavery and forced pregnancy.<sup>83</sup> Previous tribunals, such as the IMT, failed to specifically list sexual assault crimes within their charters, and consequently, were unable to prosecute them on their own, despite evidence that these crimes had been committed. In commenting on this failure, Campanaro notes that this reduced rape to a minor crime and reinforced the fact that historically it has been considered to be insignificant in theatres of armed conflicts.<sup>84</sup>

Although there has been success in getting rape and gender-based crimes against women and girls recognised and prosecuted under international law as war crimes, crimes against humanity and genocide, the international community has much to do to end the culture of impunity relating to these crimes and to bring perpetrators to justice. As one scholar notes, although International Humanitarian Law (IHL) ‘has come a long way in acknowledging the gendered components of violence during war . . . they are more symbolic than revolutionary in nature’.<sup>85</sup> International criminal institutions have only been able to prosecute a handful of perpetrators, as their jurisdiction is limited to prosecuting major perpetrators for the most serious crimes of international concern committed in the states for which they were created.<sup>86</sup> Even bringing these major perpetrators to justice has been fraught with difficulties. Nowrojee, though applauding the ICTR in producing its first landmark judgment which expanded the meaning of rape in international law, refers to this as being an exception.<sup>87</sup> The ICC has yet to obtain a successful prosecution in cases relating to SGBV committed in an armed conflict situation.<sup>88</sup> In trying to combat the deficit, the international community has repeatedly called on states to take

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<sup>81</sup> Theodor Meron ‘Editorial comment: Rape as a crime under international humanitarian law’ (1993) 87 *American Journal of International Law* 424.

<sup>82</sup> Patricia Viseur Sellers ‘Gender strategy is not a luxury for international courts’ (2009) 17 *American Journal of Gender Social Policy & the Law* 301 at 314.

<sup>83</sup> Rome Statute, art 7(1)(g), compare with ICTY Statute, art 5 and ICTR Statute, art 3.

<sup>84</sup> J. Campanaro ‘Women, war and international law’ *The Georgetown Law Journal*. 2001. 2564.

<sup>85</sup> Katherine M. Franke ‘Gendered subjects of transitional justice’ (2006) 15 *Columbia Journal of Gender & Law* 813at 817.

<sup>86</sup> Rome Statute, art 1. ICTY Statute, art 1. ICTR Statute, art 1. SCSL Statute, art 1.

<sup>87</sup> Binaifer Nowrojee ‘Your justice is too slow’: Will the ICTR fail Rwanda’s rape victims?’ (2005) at 3 available at [www.kms1.isn.ethz.ch/serviceengine/Files/ISN/38760/.../op%2B010.pdf](http://www.kms1.isn.ethz.ch/serviceengine/Files/ISN/38760/.../op%2B010.pdf) (accessed 2 February 2015).

<sup>88</sup> Two cases relating SGBV which were committed in armed conflict situations are currently being heard before the ICC. These cases are *Prosecutor v Bosco Ntaganda* ICC-01/04-02/06 and *Prosecutor v Dominic Ongwen* ICC-02/04-01/15.



responsibility for putting an end to impunity and prosecuting perpetrators who commit such crimes, stressing that their role is complementary.<sup>89</sup> The Rome Statute of the ICC also recognises the concept of complementarity. In paragraph 6 of its preamble, the Rome Statute recalls ‘that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’.<sup>90</sup> It then goes on to emphasise in paragraph 10 of its preamble and article 1 of the charter that the ICC ‘shall be complementary to national criminal jurisdictions’.<sup>91</sup> In other words, the Rome Statute only provides for a court of last resort by recognising that it is the primary duty of states to exercise jurisdiction over atrocities. Though article 17 of the Rome Statute does not mention the word complementarity, it incorporates the principle. Thus, as long as a state is investigating or prosecuting a case over which it has jurisdiction, the ICC will not have jurisdiction over that matter.<sup>92</sup> This concept of inspiring and moving states to be responsible for making perpetrators accountable has been coined by Burke-White as ‘proactive complementarity’.<sup>93</sup> Thus, a case will only be admissible before the court where ‘the state is unwilling or unable to genuinely carry out the investigation or prosecution.’<sup>94</sup>

Scholars such as Du Plessis, Louw and Maunganidze have suggested a broader approach of complementarity for African member states to that provided in the Rome Statute<sup>95</sup> in the form of a horizontal relationship (as opposed to the vertical complementary relationship in the Rome Statute) between the ICC and the state, whereby the state seeks to reduce the impunity gap contained in the Rome Statute.<sup>96</sup> The ICC has however, taken what it calls a ‘positive complementarity’ approach, by which it encourages states to bring prosecutions for crimes

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<sup>89</sup> See for example, UNSC, letter dated 7 June 2013 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary General at para 3, S/2013/335 available at [www.un.org/ga/search/view\\_doc.asp?symbol=S/2013/335](http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/335) (accessed 4 February 2015). Also statement of Special Representative of the Secretary-General on sexual violence in armed conflict, Zainab Hawa Bangura, Security Council open debate on sexual violence in conflict (17 April 2013) available at [www.peacewomen.org/.../security-council-open-debate-on-sexual-violence-in](http://www.peacewomen.org/.../security-council-open-debate-on-sexual-violence-in) (accessed 4 February 2015).

<sup>90</sup> Rome Statute, preamble, para 6.

<sup>91</sup> *Idem* at para 10 and art 1.

<sup>92</sup> *Idem* art 17(1)(a).

<sup>93</sup> Burke-White ‘Proactive complementarity’ at 53.

<sup>94</sup> *Ibid.*

<sup>95</sup> Max Du Plessis, Antoinette Louw and Otiilia Maunganidze ‘African efforts to close the impunity gap, Lessons for complementarity from national and regional actions’ (2012) 241 *Institute for Security Studies Papers*. Ryngaert also uses the horizontal and vertical expression in differentiating complementarity at the international versus state level and at the interstate level. Cedric Ryngaert ‘Applying the Rome Statute’s complementarity principle: Drawing lessons from the prosecution of core crimes by states acting under the universality principle’ (2008) 19 *Criminal Law Reform* 153 at 154.

<sup>96</sup> *Ibid.*

within the ICC's jurisdiction, in their domestic courts.<sup>97</sup> For an African state to fulfil such a complementary role with regard to crimes of SGBV that occur in armed conflict situations, it would need to ensure that the gender-specific crimes set out in the Rome Statute are included as part of its domestic law. This would enable states strengthen their domestic jurisdiction in SGBCs, and also properly investigate and prosecute such crimes. Only a few African states, such as, South Africa, Uganda and Kenya, have included the international crimes provided for in the Rome Statute in their domestic law.<sup>98</sup> In the DRC, where SGBV committed in armed conflict was prevalent, the president of the DRC only promulgated the law implementing the Rome Statute on 31 December, 2015.<sup>99</sup> It is with this in mind, that this thesis considered the application of the Rome Statute in states' domestic law, by selecting the DRC as a case study, given that it has been the state most affected by SGBV in armed conflict in Africa, and one of the first states in Africa to refer situations to the ICC. With its recent implementation of the Rome Statute in its domestic laws, it would be necessary to consider whether states in Africa, such as the DRC – seriously affected by SGBCs committed in armed conflict – can successfully bridge the impunity gap for these crimes. Although, states such as Rwanda have used the 'gacaca' means of prosecuting SGBCs, this thesis did not consider such other forms of prosecuting SGBCs in the DRC. As already stated above, the thesis focuses on the prosecution of SGBCs in the DRC, by considering the Rome Statute which was implemented in its domestic laws.

At the regional level, the AU is expanding the jurisdiction of the African Court of Justice and Human Rights by conferring on it international criminal jurisdiction.<sup>100</sup> Thus, it is hoped that at the international, regional and domestic levels the impunity gaps for SGBV at these prosecutorial levels will be bridged. Bridging these impunity gaps not only restores victims' rights and dignity, but also sends a strong warning signal to perpetrators of these crimes that they

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<sup>97</sup> ICC-ASP *Report of the Bureau on stocktaking: Complementarity. Taking stock of the principle of complementarity: bridging the impunity gap.* (18 March 2010) at 4 available at [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/.../ICC-ASP-8-51-ENG.pdf](https://asp.icc-cpi.int/en_menus/asp/complementarity/.../ICC-ASP-8-51-ENG.pdf) (accessed 11 November 2016).

<sup>98</sup> Other African States which have implemented the Rome Statute into their domestic laws are Burkina Faso and the Central African Republic, Mauritius and Senegal. Implementation of the Rome Statute available at [www.iccnw.org/>...>Ratification and Implementation](http://www.iccnw.org/>...>Ratification and Implementation) (accessed 4 February 2015).

<sup>99</sup> This law which was published in its Official Journal on 29 February 2016, came into force 30 days after its publication. Office Journal of the Democratic Republic of Congo, Office of the President of the Republic, 29 February 2016.

<sup>100</sup> The *Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Malabo Protocol), establishes the new court which will be known as African Court of Justice and Human and Peoples' Rights.



will be prosecuted. By considering these various methods of bridging the impunity gap for SCBV, this thesis aims to contribute to the legal and scholarly discussion on the bringing of perpetrators of SGBV committed in armed conflict situations in Africa to account, by considering whether the international community has finally been able to find a solution to this problem. This was carried out by examining whether all these methods complemented each other or whether one particular method was a better option or proved to be more successful.

To this extent, this thesis thus goes further than the current literature by examining at the international, regional and domestic levels in Africa, whether all forms of justice complemented each other in closing the impunity gap in relation to SGBV in armed conflict situations in Africa, or if one approach was likely to be more successful than others, and what might be learnt from the failings or successes of these various approaches. This thesis therefore proceeded on the assumption that states in Africa which ratify the Rome Statute and the proposed Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights (Malabo Protocol) into their domestic laws are willing to bring an end to SGBV committed in armed conflict situations. A limitation to this research is that as the DRC is a French-speaking state, and obtaining accurate translations in English of its laws, such as the *Journal Officiel de la Republique Democratique du Congo*, was difficult. As official translations of these documents were not available, reliance was placed on a language translator to assist with their translations. Analysis at the regional level was also based on the context of the Malabo Protocol in relation to SGBV in armed conflict situations. At the domestic level, the *Journal Officiel de la Republique Democratique du Congo*, the document implementing the Rome Statute into the DRC's domestic laws was analysed. From this analysis, consideration was given to the relationship between the ICC and the DRC on matters such as head of state immunity, cooperation and competing obligations. An analysis was also made of the steps the DRC needs to take for the effective investigation and prosecution of SGBCs, to avoid making the same mistakes as the ICC's Office of the Prosecutor (OTP).

This thesis does not consider prosecution of SGBV committed in armed conflicts by way of traditional mechanisms. Consideration was only given to the hybrid courts of the ICTY and ICTR jurisdiction which dealt with case law of SGBV committed during armed conflicts, as this case law influenced the inclusion and definition of SGBCs in the ICC's Rome Statute. Neither

does this thesis consider SGBV committed against refugees of armed conflicts. Though discussion on immunity of heads of state and state officials has been well canvassed by various scholars,<sup>101</sup> consideration was given to this topic in relation to immunity under articles 27 and 98 of the Rome Statute, as the dispute on the issue between the ICC and the AU is relevant in assessing the effect this has on SGBC in armed conflict situations in Africa, at the international and regional level. In particular, consideration was given to the effect of a referral of a non-state party to the ICC by the UNSC acting under article 13(b) of the Rome Statute.

As mentioned above, my intention was to position this thesis amongst existing literature, and add to it legal analysis of the historic development around the prosecution of SGBV in armed conflicts. By comparing the three methods of prosecuting SGBV during armed conflicts at the international, regional and domestic levels a conclusion was made as to whether all forms could be found to bridge the impunity gap of bringing perpetrators to book for SGBV in armed conflict situations. This is with the view that by prosecution, SGBV in the long run will be prevented, thereby relieving the victims of SGBV the stigma of having suffered the crimes.

## **1.4 DEFINING TERMS RELEVANT TO THE STUDY**

It is important to define two terms used throughout this thesis to clarify the context of usage in this thesis and the ambit of this thesis.

### **1.4.1 Definition of Sexual and Gender-Based Violence**

In defining what SGBV means, it is necessary to first define the term sexual violence, as this definition is incorporated in the definition of gender-based violence. The definition of sexual violence is taken from the United Nations Human Rights Office of the High Commissioner (UNHROHC) which describes sexual violence as:

[A] form of gender-based violence and encompasses any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed

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<sup>101</sup> See for example articles by Paola Gaeta and Dapo Akande, two of the leading authorities on this topic. Paola Gaeta 'Does President Al-Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315- 332. Dapo Akande 'International law immunities and the International Criminal Court' (2004) 98 *The American Journal of International Law* at 407-433. Dapo Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* at 333-352.

against a person's sexuality, using coercion, by any person regardless of their relationship to the victim, in any setting.<sup>102</sup>

Thus, sexual violence includes crimes such as rape, forced pregnancy and sexual mutilation. A necessary starting point is the definition of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 19 in 1992 and that of the United Nations General Assembly in 1993, as their definitions point to violence committed against women because of their gender. CEDAW's General Recommendation 19 refers to gender-based violence as 'violence that is directed against a woman because she is a woman or that affects women disproportionately'.<sup>103</sup> It goes on to state that gender-based violence 'includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty'.<sup>104</sup> In defining 'violence against women', the United Nations Declaration on the Elimination of Violence against Women states that this term means 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.<sup>105</sup>

The meaning of the term 'gender-based violence' is still evolving, and has yet to be developed.<sup>106</sup> Scholars have pointed to the fact that most definitions of gender-based violence exclude males and boys who are now also recognised as victims of this kind of violence,<sup>107</sup> although not to the same extent as women and children. Jeanne Ward's definition of gender-based violence, which has been adopted by The Reproductive Health for Refugees Consortium, includes men and boys as victims of violence as a result of their gender. She defines gender-based violence as:

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<sup>102</sup> OHCHR *Sexual and gender-based violence in the context of transnational justice* (October 2014) available at [http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual\\_and\\_gender-based\\_violence.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender-based_violence.pdf) (accessed 2 February 2015).

<sup>103</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against Women (Eleventh Session, 1992), U. N. Doc. A/47/38 at 1 (1993).

<sup>104</sup> *Ibid.*

<sup>105</sup> UN General Assembly, *Declaration on the Elimination of Violence against Women*, art 1. See also The Fourth World Conference on Women, Beijing Declaration and Platform for Action 1995 at para 113 which adopts the same definition.

<sup>106</sup> 'Gender-based violence in the world of work: Overview and selected annotated bibliography' available at [www.ilo.org/wcmsp5/groups/public/-.../.../wcms\\_155763.pdf](http://www.ilo.org/wcmsp5/groups/public/-.../.../wcms_155763.pdf) (accessed 2 February 2015).

<sup>107</sup> Gabrielle Ferrales and Suzy Maves McElrath (2014) 'Beyond rape, reconceptualising gender-based violence during warfare' in Rosemary Gartner and Bill McCarthy (eds) in *The Oxford Handbook of Gender, Sex and Crime*, 673 (Oxford University Press).

[a]n umbrella term for any harm that is perpetrated against a person's will, that has a negative impact on the physical or psychological health, development and identity of the person, and that is the result of gendered power inequities that exploit distinctions between males and females, among males and among females. Although not exclusive to women and girls, gender-based violence principally affects them across all cultures. Violence may be physical, sexual, psychological, economic, or socio-cultural.<sup>108</sup>

This thesis will thus adopt the typology of gender-based violence proffered by Jeanne Ward, as her definition not only includes violence committed against civilian women and girls but also civilian men and boys who are targeted because of their gender. As already explained, feminist scholars endeavoured to have gender-based violence committed against women and girls recognised as a crime in its own right in order to reverse its invisibility and spotlight the special vulnerability that civilian women and girls suffer in conflict situations because of their gender. It is only in recent years that it has come to light that men and boys can also be victims of gender-focused crimes. Although the number of male victims is infinitesimal when compared with women and girls, they should not be ignored as they also have had their human rights violated and might need medical as well as psychological help. The international community recognised this fact, in the Rome Statute of the ICC, in reports by the Secretary-General and also in various resolutions.<sup>109</sup>

#### **1.4.2 Armed Conflicts**

This thesis concentrates on SGBV committed in the course of international and/or non-international armed conflicts. It is important to draw attention to this fact as SGBV can also be committed in the course of internal disturbances and tensions, for example, during riots, such as in the case brought against Uhuru Kenyatta by the ICC.<sup>110</sup>

In addition, reports from the United Nations Secretary-General referring to SGBCs do not distinguish between SGBCs which occur during an armed conflict and those which occur during an internal disturbance or tension. The reports encompass both situations by referring to 'conflict related sexual violence', which states that the:

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<sup>108</sup> Jeanne Ward 'If not now, when? Addressing gender-based violence in refugee, internally displaced, and post-conflict settings' (2002) available at [www.thrc.org/resources/ifnotnow.pdf](http://www.thrc.org/resources/ifnotnow.pdf) (accessed 4 February 2015).

<sup>109</sup> Under article 7(3) of the Rome Statute the term 'gender' refers to both male and female. UNSC 'Report of the Secretary-General on conflict related sexual violence' at para 7 (stating that the Security Council notes 'that sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls, as well as groups that are particularly vulnerable or may be specifically targeted, while also affecting male and boys . . .').

<sup>110</sup> *Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11. One of the charges brought against Kenyatta by the ICC, was rape which was committed during Kenya's post-election violence in 2007-2008.

... term ‘conflict-related sexual violence’ refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against, women, men, girls or boys that is directly or indirectly linked (temporarily, geographically or causally) to a conflict.<sup>111</sup>

With regard to an armed conflict, the Appeals Chamber in *The Prosecutor v Dusko Tadic* stated:

An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.<sup>112</sup>

There are two types of armed conflict in International Humanitarian Law (IHL), international and non-international armed conflicts. Common Article 2 to the 1949 Geneva Conventions provides that:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.<sup>113</sup>

The ICTY Appeals Chamber states that an armed conflict is considered as being international

... if it takes place between two or more states. In addition, in case of an internal armed conflict breaking out on the territory of a state, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another state intervenes in the conflict through his troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state.<sup>114</sup>

In the case of non-international armed conflicts, Protocol Additional II to the Geneva Conventions of 8 June 1977 provides:

... that these types of armed conflict take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>115</sup>

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<sup>111</sup> UNSC ‘Report of the Secretary-General on conflict related sexual violence’ at para 1 (13 March 2014). UNSC ‘Report of the Secretary-General on conflict related sexual violence’ para 2 (20 April 2016).

<sup>112</sup> *Prosecutor v Dusko Tadic* ‘Decision on the defence motion for interlocutory appeal on jurisdiction’ (Appeals Chamber) para 70 (2 October 1995) IT-94-1-A.

<sup>113</sup> *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949. Referring to Common article 2 to the Geneva Conventions 1949 see also *Prosecutor v Thomas Lubanga Dyilo* ‘Decision on the confirmation of charges’ para 206 (29 January 2007) ICC-01/04-01/06.

<sup>114</sup> *Prosecutor v Dusko Tadic* (Appeals Judgment) para 84 (15 July 1999) IT-94-1-A. See also *Prosecutor v Thomas Lubanga Dyilo* ‘Decision on the confirmation of charges’ para 209.

<sup>115</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, of 8 June 1977, art 1.1. The Pre-Trial Chamber in the *Lubanga* case noted that ‘the ability to carry out sustained and concerted military operations is no longer linked to territorial

The Protocol makes it clear that it does ‘not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts’.<sup>116</sup>

## **1.5 OBJECTIVES OF THE STUDY AND KEY QUESTIONS TO BE ASKED**

1.5.1 The objectives of the study flow from the problem statement. Consequently, the specific objectives of the study are to:

- a) Examine the evolutionary response of international law to SGBV in armed conflict situations in order to provide an understanding of the problem(s) relating to the invisibility of SGBV in armed conflict situations.
- b) Examine the existing legal frameworks together with relevant reported cases of the ICTY, ICTR, and ICC, to identify the basis of these decisions aimed at addressing the problem(s) of overcoming the invisibility of SGBV in armed conflict situations.
- c) Identify the challenges and problems faced by the ICC in prosecuting SGBV in armed conflict situations.
- d) Examine whether the DRC by implementing the Rome Statute into its domestic laws, and the proposed African Court of Justice as well as Human and Peoples’ Rights, will concomitantly with the ICC complement each other in the fight against impunity with regard to SGBV in armed conflict situations.

### **1.5.2 Research questions**

- a) What is the historical framework relating to criminalisation and prosecution of SGBV in armed conflict situations under international law?
- b) Have the conflicting views of the definition of rape at the ICTY and ICTR helped strengthen the prosecution of SGBV in armed conflict situations before the ICC?
- c) In what ways has the ICC failed to bring perpetrators of SGBV in armed conflict situations to justice?
- d) Will the proposed prosecution of international law crimes in the African Court of Justice and Human and Peoples’ Rights (ACJHPR) be a viable alternative in prosecuting SGBV in armed conflict situations at the regional level? In answering this question, the thesis will briefly address complementarity under the ACJHPR and preferred institutional affiliation for African states (ICC or the proposed ACJHPR) in

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control.’ As a result of this the Pre-Trial Chamber stated that ‘the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character. *Prosecutor v Thomas Lubanga Dyilo* ‘Decision on the confirmation of charges’ paras 209 and 233.

<sup>116</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, art 1.2.

the light of recent controversies surrounding Head of State immunity. The final analysis will revolve around whether the ACJHPR will be better equipped than the ICC in understanding and prosecuting SGBV committed in armed conflict situations?

- e) Can the promulgation of the Rome Statute in the DRC's domestic laws help bridge the impunity gap in the fight against SGBV committed in armed conflicts in Africa?

## **1.6 RESEARCH DESIGN AND METHODOLOGY**

### **1.6.1 Research Design**

The invisibility of SGBV in armed conflict situations is a concept which evolved from feminist jurisprudence and activists such as Askin, Copelon and Charlesworth. It is necessary for this thesis to commence by considering such jurisprudence for an understanding and appreciation of SGBV in armed conflict, and to appreciate why so much effort was put in by these feminist scholars and activists to have such crime considered a crime in its own right. Evidence of the feminist jurisprudence approach is found in the case law of the *ad hoc* tribunals and the ICC, which speaks to the fact that most of the influential academic writings have emerged from the feminist school. More recently, it has been acknowledged that men and boys can also suffer sexual assault as a result of their gender.

This thesis also takes a critical legal approach to the prosecution of SGBV in armed conflicts at the domestic and regional levels in Africa, to determine whether prosecution of these crimes at these domestic and regional levels will complement the work of the ICC, and thus help in bridging the impunity gap. In this analysis, much was drawn from a critical legal approach of studies by scholars such as Burke-White, Du Plessis, Murungu and Abassare. At the regional level, the plans for the proposed ACJHPR to take up the prosecution of international crimes, in so far as they relate to SGBV committed in armed conflict situations, were considered. Such theories as the complementarity principle by the court, immunity of heads of state from prosecution of SGBV and whether the court will have advantage over the ICC in prosecution of such crimes where member states are concerned were considered.

### **1.6.2 Research Methodology**

This research does not involve interviews, but uses a purely text-based approach, analysing relevant legislation, treaties, protocols, case laws, policy papers and scholastic works and articles relating to SGBV committed in armed conflict situations in Africa.

Primary and secondary sources are relied on. Primary sources include materials such as the Rome Statute of the ICC, the Protocol on Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights (Malabo Protocol), the DRC's Constitution, *Journal Officiel de la Republique Democratique du Congo*, ICC Policy Paper on Sexual and Gender-based Crimes and other ICC documents. Other primary sources include statutes of the ICTY and ICTR, which paved the way for the creation of the ICC and the subsequent judgments of these tribunals.

Secondary sources of information include, in particular, monographs relating to this area of law mapping out how feminists strove to include crimes of SGBV as crimes in their own right for classification as war crimes, crimes against humanity and genocide, and the judicial approach of prosecuting such crimes. Textbooks, journal articles, internet materials, reports of NGOs such as Human Rights Watch and Amnesty International, Security Council press releases and newspaper articles were also studied. Relevant cases and laws relating to how judges have interpreted sexual and gender-based cases were also considered, along with articles relevant to this topic. Determining the accuracy of each secondary source was considered by cross-referencing it with other secondary and primary sources.

## **1.7 STRUCTURE OF THE THESIS**

This thesis contains seven chapters in all.

**Chapter 1** deals with introductory matters such as the background to the study, statement of the problem, reasons for choosing the topic and aims of the study, defining terms relevant to this thesis, objectives of the study and research questions, research methodology and structure of the thesis.

**Chapter 2** focuses primarily on the literature review relating to SGBV in armed conflict situations in the IMT, IMTFE, ICTY, ICTR and ICC.

**Chapter 3** applies a doctrinal approach in considering the Prosecutor's discretionary powers in the selection of situations and cases at the ICC. In particular, chapter three considers the nature of the Prosecutor's powers in the selection of situations and cases under the ICC's Rome Statute, how the Prosecutor has applied these powers in situations and cases where SGBV in armed



conflicts has occurred; and how the Office of the Prosecutor (OTP) has rectified mistakes made in the selection of these situations and cases.

**Chapter 4** critically examines cases relating to SGBV committed in armed conflicts before the ICC. The Prosecutor's weaknesses in being able to obtain successful prosecutions before the ICC, and judges' interpretation of facts relating to cases before the ICC are examined. The chapter reveals the problem in securing convictions for such crimes despite feminist scholars having succeeded in getting SGBCs committed in armed conflict situations recognised as crimes in their own right. This examination was necessary to enable other courts to recognise that drafting and implementing laws requires practical understanding and recognition of the need to bring successful convictions of SGBV in armed conflict situations.

**In chapter 5**, the prosecution of SGBV in armed conflicts at the regional level and at the state and individual levels is examined using the provisions in the Malabo Protocol. The chapter provides a brief review of the Constitutive Act (CA) of the African Union and the legal basis for the creation of the ACJHPR. The chapter reveals the weaknesses in the Malabo Protocol relating to SGBCs, and the need to redraft it with suggestions from NGOs and other bodies. Chapter five also explores the reality that the AU prefers negotiating with states regarding bringing impunity of SGBCs to an end, rather than prosecuting perpetrators of these crimes.

**Chapter 6** considers the prosecution of SGBV during armed conflict at the domestic level by examining the DRC's *Journal Officiel de la Republique Democratique du Congo* which implemented the Rome Statute into its domestic laws. A brief resumé of the occurrence of SGBV in armed conflicts in the DRC is considered and how the DRC has tried to combat impunity for SGBV before implementing the Rome Statute in its domestic law. The chapter also examines how the implementation of the Rome Statute in the DRC's domestic laws has strengthened the relationship between the ICC and the DRC on such issues as head of state immunity, competing obligations and cooperation. Suggestions were also made on steps the DRC should take in its investigation and prosecution of SGBCs to avoid making the same mistakes which the ICC has made.

**Chapter 7** concludes the thesis by summarising and making recommendations.

## CHAPTER 2

### ENGRAFTING GENDER CRIMES INTO INTERNATIONAL TRIBUNALS

#### 2.1 INTRODUCTION

Though rape and other sexual and gender-based crimes (SGBCs) committed during an armed conflict have happened throughout history, the international community still faces the problem of how best these crimes can be prevented. Many feminist scholars believe that this can be achieved by effectively prosecuting rape and other SGBCs as crimes premised on the recognition that they are distinct war crimes in their own right, so that they may be considered on the same level as other grave crimes, such as murder.<sup>117</sup> It is acknowledged that the prosecution of crimes in criminal tribunals at the international level will not necessarily deter their complete reoccurrence, but at least it would hold perpetrators accountable, and bring some relief to victims.<sup>118</sup>

SGBCs against women have been largely ‘invisible’, and despite being prohibited, have not been accorded the same status as other grave crimes. Besides, women were not duly recognised as being wronged or abused. In ancient times, for example, raping a woman was considered an offence against those who owned her, such as her father or husband, rather than an offence against her person.<sup>119</sup> During the Middle Ages there were medieval edicts relating to humanitarian law which prohibited the rape of women during war carrying the penalty of a death. Examples of these edicts were the Ordinances of War enacted in Durham by Richard II in

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<sup>117</sup> Kathleen M Pratt and Laurel E Fletcher ‘Time for justice: The case for the international prosecutions of rape and gender-based violence in the former Yugoslavia’ (1994) 9 *Berkeley Women’s Law Journal* 77 at 81 (stating that ‘despite the global pervasiveness of rape and gender-based violence, gender specific violations of humanitarian and human rights’ laws have not been accorded the same attention as other violations in prosecutions for serious violations of international law’.)

<sup>118</sup> Naomi Cahn ‘Beyond retribution and impunity: Responding to war crimes of sexual violence’ (2005) 1 *Stanford Journal of Civil Rights and Civil Liberties* 217 at 241 (stating that international criminal tribunals do not necessarily deter future crimes, but serve instead to hold perpetrators accountable as vivid reminders of the conflicts’ destruction.) Wood, however, believes that effective and efficient prosecution of crimes could act as deterrence to future conflicts. Stephanie K Wood ‘A woman scorned for the “Least condemned” war crime: Precedent and problems with prosecuting rape as a serious war crime in the International Criminal Tribunal for Rwanda’ (2004) 13 *Columbia Journal of Gender and Law* 274 at 327 (recognising that legal justice is a limited recourse; however if violations are effectively and efficiently prosecuted after the fact, achieving full enforcement, it may act as a deterrent in future conflicts.)

<sup>119</sup> Catherine N Niarchos ‘Women, war and rape: Challenges facing the International Tribunal for the former Yugoslavia’ (1995) 17 *Human Rights Quarterly* 649 at 660.

1385 and those attributed to Henry V in 1419 at Mantes.<sup>120</sup> Though these ordinances offered women some legal protection because of their economic value to the ‘owner’,<sup>121</sup> they were usually ignored. In the event of a ‘just war’, the prohibition of rape did not apply as medieval laws permitted rape in order to force a city under siege to surrender.<sup>122</sup> The first recorded international criminal trial, which took place in 1474, illustrates this point, when Sir Peter Hagenbach was convicted for violating the rules or customs of war when his troops raped and murdered innocent civilians, along with other crimes, without first declaring war.<sup>123</sup> The acts committed by Sir Hagenbach’s troops were only considered illegal because he had not declared war.<sup>124</sup> Even in an internal armed conflict, rape committed by state actors could be permitted by a ruler as a means of showing sovereignty and in order to defend his kingdom<sup>125</sup> Thus, the rape of women could be said to have evolved from unequal power relations between men and women historically, and still manifests in today’s societies.<sup>126</sup> The later part of the 19th century and early 20th century is considered the ‘initial modern period of international humanitarian law’ (IHL).<sup>127</sup> SGBCs, including rape which occurred in times of war were codified in treaties and war codes. For example, the United States and its allies entered into treaties which not only regulated commerce but also expressed their customary law expectations in the event of war.<sup>128</sup> Although these treaties prohibited sexual violence, their purpose was to minimise economic disruption

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- <sup>120</sup> *Idem* at 661. Theodor Meron ‘Editorial comment: Rape as a crime under international humanitarian law’ (1993) 87 *American Journal of International Law* 424. Patricia Viseur Sellers ‘The cultural value of sexual violence’ (1999) 93 *American Society of International Law Proceedings* 312 at 314.

<sup>121</sup> Sellers ‘The cultural value of sexual violence’ at 315.

<sup>122</sup> *Ibid.* Niarchos in agreeing with Meron, states that rape committed during siege warfare was permitted, because it was used as an incentive for soldiers. Niarchos ‘Women, war and rape’ at 661. Meron ‘Editorial comment’ at 425 (stating that in many cases ... rape has been given a license, either as an encouragement for soldiers or as an instrument of policy.)

<sup>123</sup> M Cherif Bassiouni ‘The Time has come for an International Criminal Court’ (1991) 1 *Indianan International and Comparative Law Review* 1. Kelly Askin ‘Treatment of Sexual Violence in armed conflicts: A historical perspective and the way forward’ in *Sexual violence as an international crime: Interdisciplinary approaches*. (2013) Anne-Marie de Brouwer, Charlotte Ku et al (eds) at 20.

<sup>124</sup> *Idem. Idem.*

<sup>125</sup> Sellers ‘The cultural value of sexual violence’ at 315.

<sup>126</sup> *Idem* at 314 (she argues that the political and social mores of a society made sexual violence committed during armed conflict, initially legal and then illegal). Niarchos, on the other hand sees the exploitation of wartime rape as a result of its ‘propaganda value.’ Niarchos ‘Women, war and rape’ at 649 and 651.

<sup>127</sup> Patricia Viseur Sellers ‘The prosecution of sexual violence in conflict: The importance of human rights as means of interpretation’ available at [https://www.ohchr.org/Documents/Issues/Women/WRGS/Paper\\_Prosecution\\_of\\_Sexual\\_Violence.pdf](https://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf) (accessed 14 January 2015).

<sup>128</sup> Sellers ‘The culture value of sexual violence’ at 316.

caused by sexual violence in war.<sup>129</sup> Article 23 of the 1785 Treaty of Amity and Commerce between the United States and Prussia, for example, provided that ‘women and children. . . shall not be molested in their persons’ where a war ensued between two contracting parties.<sup>130</sup> The Lieber Code 1863,<sup>131</sup> the first attempt to codify the laws of war, portrays the changing view of rape during military sieges when compared to the medieval era (where rape was permitted to confirm victory over the enemy).<sup>132</sup> The Lieber Code provided protection during war to those captured by the enemy, regardless of that person’s sex, religious affiliation, status or occupation.<sup>133</sup> It criminalised rape as an offence punishable by death, thus, signifying the position taken under customary humanitarian law that rape was prohibited.<sup>134</sup> Later, other codifications of the laws of war implicitly or explicitly prohibited sexual violence by considering it either as a violation against women’s honour or dignity – instead of an offence against women. Such an example is found in article 46 of The Hague Conventions and Regulations, which has been construed as prohibiting sexual violence and wartime rape, even though this provision does not specifically mention sexual violence or rape. Article 46 provides that ‘family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected’.<sup>135</sup> Sellers, in referring to the article, states that rape was prohibited to

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<sup>129</sup> *Ibid.*

<sup>130</sup> Kelly Askin ‘Treatment of sexual violence in armed conflicts’ in *Interdisciplinary Approaches to Recognizing, Investigating and Prosecuting Sexual Violence as an International Crime* eds Anne-Marie de Brouwer et al(2013) at 23.

<sup>131</sup> Also known as the ‘Lieber Instructions.’ Though the ‘Lieber Instructions’ were binding on the United States forces during the American Civil War, they influenced the codification of other laws of war such as the Hague Conventions, and also similar regulations which were adopted by other states. *Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (24 April 1863) available at <https://www.icrc.org/ihl/INTRO/110?OpenDocument> (accessed 10 January 2015).

<sup>132</sup> Sellers ‘The cultural value of sexual violence’ at 317.

<sup>133</sup> *Ibid.*

<sup>134</sup> Kelly Askin ‘Treatment of Sexual Violence in armed conflicts’ at 23. Section II of the ‘Lieber Instructions’ under which articles 44 and 47 are, is titled in part ‘Protection of persons, and especially women, of religion, the arts and science.’

Article 44 provides: All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited in the penalty of death and such other severe punishment as may seem adequate for the gravity of the offense.’

Article 47 provides: ‘Crimes punishable by all penal codes, such as . . . rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severe punishment shall be preferred.’

<sup>135</sup> Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Custom of War on Land, The Hague, 29 July 1899, 32 Stat. 1803, 1822, 1 Bevans 247, 260, art 46. Convention Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Custom of War on Land, The Hague, 18 Oct. 1907, 36 Stat. 2277, 2306-07, 1 Bevans 631, 651, art 46. The 1899 Hague Convention was revised in 1907. See Sellers ‘The cultural value of sexual violence’ at 318 regarding

promote pacification during occupation and also because it inhibited the restoration of civil society.<sup>136</sup> Thus by recognising rape as an illegal act, article 46 supports the humanitarian law theory that sexual offences, including rape, lead to the breakdown of civil society<sup>137</sup> – even though it is the only reference in The Hague Conventions and Regulations to sexual violence and rape. With regard to the application of international human rights law in armed conflict situations, the Martens Clause which is contained in The Hague Conventions, supports the principle that human rights norms continue to apply in armed conflict situations.<sup>138</sup> Thus, as international human rights norms reinforce and supplement international humanitarian law, they are applicable in situations covered by an article 46.<sup>139</sup> Although the 1949 Geneva Conventions and the Additional Protocols of 1977 recognised that women were vulnerable to SGBCs during armed conflict, these crimes were categorised as matters relating to women’s honour and dignity, which will be discussed further in this chapter.

As discussed above, the first international criminal court designed to try any commander for allowing his troops to rape and kill civilians was established in 1474.<sup>140</sup> Thereafter, other important tribunals created were the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE). These tribunals did not do justice to the victims of SGBCs. It was the genocide and ethnic cleansing in former Yugoslavia and Rwanda which spurred the Security Council to set up tribunals to prosecute the atrocious crimes committed in these countries, following upon outcries by the international community.<sup>141</sup> These two conflicts opened an avenue for feminist scholars and activists to employ the use of international humanitarian law to address SGBCs, and also to implement laws relating to these

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violation of one’s family honour now understood in the 20th century to include sexual assault, such as rape. See also Kelly D Askin ‘Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advance, enduring obstacles, (2003) 21 *Berkeley Journal of International Law* 288 at 300. Though Article 46 is said to cover sexual violence, in practice it has rarely been interpreted as covering sexual violence. Meron ‘Editorial comment’ at 425.

<sup>136</sup> Sellers ‘The cultural value of sexual violence’ at 318.

<sup>137</sup> *Ibid.*

<sup>138</sup> Askin ‘Prosecuting wartime rape’ at 293.

<sup>139</sup> *Ibid.*

<sup>140</sup> Susana SaCouto and Katherine Cleary ‘The Women’s Protocol to the African Charter and Sexual Violence in the context of armed conflict or other mass atrocity’ (2009) 16 *Washington & Lee Journal of Civil Rights and Social Justice* 173 at 175 referring to Mahmoud Cherif Bassiouni ‘The time has come for an International Criminal Court’ (1991) 1 *Indiana International & Comparative Law Review*. Dianne Luping ‘Investigation and prosecution of sexual and gender-based crimes before the International Criminal Court’ (2009) 17 *American University Journal of Gender Social Policy & Law* 431 at 436-7. (Luping points out that even though the crime of rape was tried, it was considered illegal because the war was ‘undeclared’ thus making it unjust and illegal.

<sup>141</sup> Meron ‘Editorial comment’ at 424.

crimes.<sup>142</sup> Thereafter, in 2002, the long talked-about ICC came into force after 60 countries ratified its statute. One of the major achievements made by the feminist scholars and activists was the inclusion of SGBCs as distinct crimes duly recognised in their own right in the Rome Statute.

In this regard, this chapter will consider SGBCs committed in armed conflicts from four different perspectives to show how SGBCs have moved from being invisible to being recognised as violent crimes in their own right, prompted by the struggle of feminist scholars and human rights women's organisations to have these crimes accorded the same status as other grave crimes by having them investigated and prosecuted as crimes in their own right in international criminal treaties. The chapter will also consider the articles prohibiting sexual violence under the Geneva Conventions and Additional Protocols. Although provision was made to protect women from sexually violent crimes such as rape during wartime, rape was not included as a grave breach. The first perspective will consider how the IMT and IMTFE handled SGBCs. Most feminist scholars believe that the prosecution of SGBCs by these tribunals was glossed over. Secondly, the Geneva Conventions and Additional Protocols in relation to the protection given victims of sexual crimes is considered. Consideration is given in the third section to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), in which wartime SGBCs were reconceptualised. The concluding (fourth) section will consider the inclusion of SGBCs in the ICC's Rome Statute.

## **2.2 THE INTERNATIONAL MILITARY TRIBUNALS AT NUREMBERG AND IN THE FAR EAST**

The IMT and IMTFE were established after World War II to try German and Japanese war criminals, respectively for war crimes committed in the war. The IMT was situated in Nuremberg, Germany, and the IMTFE was located in Tokyo, Japan. The IMT has been described as marking 'the creation of the first such tribunal to evaluate war crimes and crimes against humanity'.<sup>143</sup> Despite criticisms that the IMT was a 'victor's justice' tribunal, together with the

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<sup>142</sup> Janet Halley 'Rape at Rome: Feminist interventions in the criminalisation of sex-related violence in positive international criminal law' (2008) 30 *Michigan Journal of International Law* 1 at 8.

<sup>143</sup> Christopher K Hale 'Does the evolution of international criminal law end with the ICC? The "Roaming ICC": A model International Criminal Court for a state-centric world of international law' (2006-2007) 35 *Denver Journal of International Law and Policy* 429 at 442 (quoting Laurie A Cohen 'Comment, application of the realists and liberal perspectives to the implementation of war crimes trials: Case studies of Nuremberg and Bosnia' (1997) 2 *UCLA*

12 subsequent trials,<sup>144</sup> it was recognised as having laid the basic foundations for developing international criminal law and also establishing international criminal tribunals.<sup>145</sup> The IMTFE trials, on the other hand, did not carry the same historical and legal weight as they were considered unfair to defendants.<sup>146</sup> The IMT commenced in November 1945 ended in October 1946. The IMTFE commenced in May 1946, and ended in November 1948, two years after the IMT trial had been concluded.<sup>147</sup>

### 2.2.1 The International Military Tribunal at Nuremberg

The IMT was founded after the four Allied governments signed the London Agreement<sup>148</sup> on August 8 1945, for the ‘just and prompt trial and punishment of major war criminals of the

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*Journal of International Law and Foreign Affairs* 113 at 143). Hale however refers to Leila N Sadat (2002) *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) Martinus Nijhoff 27, where Sadat points out that though international criminal tribunals existed before the Nuremberg Tribunals, none of them possessed the same legal significance. Hale also refers to William A Schabas (2006) ‘The United Nations International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra-Leone’ *Cambridge University Press* 7 where he points out that Bert V A Röling, a jurist and judge maintained that the Tokyo and Nuremberg Tribunals were not ‘international tribunals in the strict sense’ but were more aptly described as ‘multinational tribunals’.

<sup>144</sup> The 12 subsequent trials were trials conducted by the United States in Nuremberg after the end of the initial Nuremberg Trial. Each Allied government conducted subsequent trials to try a larger segment of Germans, such as, diplomats, politicians and physicians accused of committing Nazi crimes, as the four Allied governments, could not agree to a joint subsequent trial after the IMT. The Allied Control Council for Germany enacted the Control Council Law No. 10 on 20 December 1945. Law No. 10 to establish ‘a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.’ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) available at <https://www1.umn.edu/humanrts/instree/ccno10.htm> (accessed 14 January 2015). Trials of War Criminals before the Nuerngerg Military Tribunals, Volume II, ‘The Medical Case’ ‘The Milch Case available at [www.ioc.gov/r/frd/Military\\_Law/pdf/NT\\_war-criminals-Vol-II.pdf](http://www.ioc.gov/r/frd/Military_Law/pdf/NT_war-criminals-Vol-II.pdf) (accessed 12 January 2015). Some scholars have argued that the IMT at Nuremberg and the IMT for the Far East are not truly international tribunals ‘as they were concluded by agreement between the Allied powers in Europe and not by the international community as such.’ Phillip Wardle ‘The survival of Head of State immunity at the International Criminal Court’ (2011) 18 *Australian International Law Journal* 181 at 190 referring to Madeline Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’ (2001) 64 *Law and Contemporary Problems* 13. See also Benjamin B Ferencz ‘International Criminal Courts: The legacy of Nuremberg’ (1998) 10 *Pace International Law Review* 203 at 213.

<sup>145</sup> Hale ‘Does the evolution of international criminal law end with the ICC?’ at 444. Ferencz ‘International criminal courts’ at 215. Jocelyn Campanaro ‘Women, war and international law: The historical treatment of gender-based war crimes’ (2000-2001) 89 *Georgetown Law Journal* 2557, 2560 (stating that many of the principles which emerged from the IMT and IMTE Charters formed the basis of the United Nations).

<sup>146</sup> *Ibid.*

<sup>147</sup> U S Department of State Office of the Historian, The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948) available at <https://history.state.gov/milestones/1945-1952/nuremberg> (accessed 14 January 2015). Allan A Ryan ‘Nuremberg’s Contribution to International Law’ (2007) 30 *Boston College International and Comparative Law Review* 55, 55

<sup>148</sup> The four Allied governments were of the United Kingdom, the United States, the Provisional Government of the French Republic and of the Union of Soviet Socialist Republics. United Nations, Agreement for the prosecution ‘and punishment of the major war criminals of the European Axis, (‘London Agreement’), 8 August 1945, 82 U.N.T.S 280 available at <http://www.refworld.org/docid/47dfb34.html> (accessed 14 January 2015).

European Axis.’<sup>149</sup> The agreement which had the Charter of the IMT appended to it, defined the tribunal’s constitution, jurisdiction and function.<sup>150</sup> Nineteen other United Nations states subsequently adopted the London Agreement and its Charter, in accordance with the procedure premised on its article 5.<sup>151</sup> When the trial began in November 1945, 22 of the 24 indicted defendants were prosecuted.<sup>152</sup> The defendants represented a cross-section of leaders of the Nazi Party and German Reich who were responsible for not only organising but also carrying out a systematic and planned reign of terror in Germany, the satellite Axis states and a number of occupied countries in Europe.<sup>153</sup> Six Nazi organisations were also charged,<sup>154</sup> but the tribunal found only four of these organisations criminally liable.<sup>155</sup>

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<sup>149</sup> *Ibid.* Also at United Nations Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (‘London Agreement’) 8 August 1945, 82 UNTS 279, 59 Stat., art 1 available at <http://www.refworld.org/docid/3ae6b39614.html> (accessed 14 January 2015).

<sup>150</sup> *Ibid.*

<sup>151</sup> The 19 United Nations states were Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia. International Military Tribunal (Nuremberg) Judgment of 1 October 1946 available at [http://www.crimeofaggression.info/documents/6/1946\\_Nuremberg\\_Judgment.odf](http://www.crimeofaggression.info/documents/6/1946_Nuremberg_Judgment.odf) (accessed 15 January 2015). See also ‘Preface to Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945’ available at [http://www.loc.gov/rr/frd/military\\_Law/pdf/jackson-rpt-military-trials.pdf](http://www.loc.gov/rr/frd/military_Law/pdf/jackson-rpt-military-trials.pdf) (accessed 15 January 2015). The United Nations General Assembly on 11 December, 1946 affirmed the principles of international law recognised by the IMT Charter and also the Tribunal’s judgment. General Assembly Resolutions 1st Sessions available at [www.un.org/documents/ga/res/1/ares1.htm](http://www.un.org/documents/ga/res/1/ares1.htm) (accessed 15 January 2015). Matthew Lippman ‘Nuremberg: Forty Five Years Later’ (1991-1992) 7 *Connecticut Journal of International Law* 1. United Nations ‘Agreement for the prosecution and punishment of the major war criminals’ art 5 which provides that ‘[a]ny Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatories and adhering Governments of each such adherence.’

<sup>152</sup> Though 22 men were prosecuted, three of them were acquitted. One committed suicide whilst in prison; another could not be tried because of his physical and mental condition, whilst the third individual was tried in his absence. Of the 19 men convicted, 12 were sentenced to death by hanging, three to life imprisonment and the remaining four to prison terms ranging from 10 to 20 years. See International Military Tribunal (Nuremberg) Judgment of 1 October 1946.

<sup>153</sup> ‘Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945 in Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945’ available at [http://www.loc.gov/rr/frd/military\\_Law/pdf/jackson-rpt-military-trials.pdf](http://www.loc.gov/rr/frd/military_Law/pdf/jackson-rpt-military-trials.pdf) (accessed 15 January 2015).

<sup>154</sup> United Nations Charter of the International Military Tribunal, art 9 which provides in part that ‘[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization’.

<sup>155</sup> The six organisations which were indicted were The Leadership Corps of the Nazi Party; Die Schutzstaffeln (also known as the SS); Die Sicherheitsdienst (also known as the SD); Die GeheimstaatsPolizie (also known as the Gestapo or Secret State Police); Die Sturmabteilungen (also known as the SA); the Reichscabinet, and the General Staff and High Command. The first four organisations were found to be criminally liable. (LXIII, ‘Report to the President by Mr. Justice Jackson, October 7, 1946 in Report of Robert H. Jackson, United States Representative to



The Charter provided the IMT with jurisdiction to prosecute defendants charged with crimes against peace, war crimes, crimes against humanity, and crimes of a common plan or conspiracy. These crimes were defined in article 6 of the IMT Charter as:

Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;<sup>156</sup>

War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or destruction not justified by military necessity.<sup>157</sup>

Crimes against humanity were also defined in the London Charter as:

Crimes against humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>158</sup>

For each of these offences '[l]eaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes were (sic) responsible for all acts performed by any persons in execution of such plan'<sup>159</sup> according to the article. In addition to providing the IMT jurisdiction over the above-mentioned crimes, the Charter also provided that individuals, rather than states, could be made liable for these international crimes, regardless of their official position. Thus, it curtailed the concept of national sovereignty, in that a head of state or responsible government officials could be

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the International Conference on Military Trials, London, 1945' available at [http://www.loc.gov/r/rfd/military\\_Law/pdf/jackson-rpt-military-trials.pdf](http://www.loc.gov/r/rfd/military_Law/pdf/jackson-rpt-military-trials.pdf) (accessed 15 January 2015).

<sup>156</sup> United Nations Charter of the International Military Tribunal, art 6(a).

<sup>157</sup> *Idem* art 6(b).

<sup>158</sup> *Idem* art 6(c). This is the first time that crimes against humanity were defined. The origin of this crime can be traced as far back to 1915, when three of the Allied governments, France, Great Britain and Russia criticised the massacre of Armenians by the Ottoman government as constituting 'crimes against civilization and humanity'. See Mahmoud Cherif Bassiouni *Crimes against Humanity in International Criminal Law* 2 revised ed (1999) Kluwer Law International at 61. See page 34 for further explanation of 'crimes against humanity.'

<sup>159</sup> In addition to crimes against humanity being introduced into international law by the Charter, crimes against peace, conspiracy to commit a war crime or a crime against peace or humanity and the recognition of criminal organisations were also novel crimes introduced by the Charter. Askin 'War crimes against women at 160.

prosecuted under the London Charter.<sup>160</sup> This provision, as described by Hale, ‘established the foundational principles of international criminal law’ and also ‘the principle that international law pre-empts national law’.<sup>161</sup> Another significant aspect of the London Charter is that a defendant acting under government’s authority or that of a superior would not be absolved from his/her actions, although it might be a factor in the mitigation of sentence.<sup>162</sup>

Although the work of the IMT has been highly praised by scholars in its development of modern international law,<sup>163</sup> one aspect lacking in the jurisprudence was the failure to include gender specific atrocities (such as rape committed against women and children) in the crimes listed under the tribunal’s jurisdiction. This omission lent credence to the notion that rape and sexually-related assaults committed during armed conflicts were not viewed with the same level of concern as traditionally committed grave crimes.<sup>164</sup> The evidence on war crimes and crimes against humanity which was presented before the IMT by the French and Soviet prosecutors<sup>165</sup> revealed that rape and various forms of sexual assaults such as forced prostitution, forced abortion and sexual mutilation had been committed, not only by the Germans but also by the Allied forces.<sup>166</sup> According to Copelon, concentration camp brothels set up for raping Jewish and

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<sup>160</sup> United Nations Charter of the International Military Tribunal, art 7 which provides that ‘[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.’

<sup>161</sup> Hale ‘Does the evolution of international criminal law end with the ICC?’ (2008) 35 *Denver Journal of International Law and Policy* at 444. Ryan ‘Nuremberg’s contribution to international law’ describing the IMT as having changed ‘forever the presumptions of national sovereignty, individual responsibility, and personal accountability that had underlain international law since the rise of nation states three centuries before.’

<sup>162</sup> United Nations Charter of the International Military Tribunal, art 8.

<sup>163</sup> Campanaro ‘Women, war and international law’ at 2560. Hale ‘Does the evolution of international criminal law end with the ICC?’ at 444. Ryan ‘Nuremberg’s contribution to international law’ at 55 (describing the IMT as ‘the most significant development in human rights law in the twentieth century’ and also as ‘the first trial for violations of human rights’ yet gender specific crimes which were committed were not prosecuted.) See also The influence of the Nuremberg Trial on international criminal law, available at

[www.robertjackson.org>...>Speeches Related To Robert H. Jackson](http://www.robertjackson.org>...>Speeches Related To Robert H. Jackson) (accessed 14 January 2015).

P D Marquardt ‘Law without borders: The constitutionality of the International Criminal Court’ (1995) 33 *Columbia Journal of Transnational Law* 73, 82.

<sup>164</sup> *Idem* at 2561.

<sup>165</sup> The indictment contained four counts. The United States was responsible for trying the conspiracy count whilst the United Kingdom was responsible for trying crimes against peace.

<sup>166</sup> Niarchos ‘Women, war and rape’ at 665– 666 (stating that the Union of Soviet Socialist Republic soldiers committed rape, when they captured Berlin in 1945. Between 110 000 and 800 000 women are reported to have been raped). Kelly D Askin ‘A decade of the development of gender crimes in international courts and tribunals: 1993 to 2003’ (2004) 11 *Human Rights Brief* at 16 (noting that evidence of ‘rape of medical and first-aid nurses’ and various forms of sexual assault were submitted to the IMT). Kelly D Askin ‘Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals: Current status’ (1999) 93 *The American Journal of International Law* 97 at 99 (stating that the Nuremberg and Tokyo Tribunals largely ignored gender-based crimes). Luping is of the opinion that the factual findings relating to the charges brought against the defendants would have

Aryan women were not included in the IMT proceedings. She also states that the rapes committed by the Allied forces on German women were also not included.<sup>167</sup> This is not surprising as the IMT was established after World War II to try German war criminals for war crimes committed, thus the crimes committed by the Allied forces did not fall to be mentioned in the jurisprudence emanating from the IMT.<sup>168</sup> Also as pointed out by Askin, the Allied governments would not have wanted to prosecute gender specific crimes as they were also guilty of committing these offences.<sup>169</sup>

Scholars have criticised the IMT for failing to prosecute rape and other SGBCs despite the wealth of evidence that these crimes took place. They argue that these crimes could still have been prosecuted as war crimes and/or crimes against humanity, given that the Charter is flexible. The crimes listed under the war crimes provision in article 6(b) of the Charter, are crimes which international law recognised as such. As stated in the IMT judgment, these crimes were covered by certain articles in the 1907 Hague Convention and 1929 Geneva Convention.<sup>170</sup> In support of the argument that rape and other SGBCs could have been prosecuted as war crimes, Askin argues that under article 6(b) of the Charter, the words ‘but not be limited to’, ‘expressly allowed for other violations of laws or customs of war which were not already enumerated’.<sup>171</sup> Thus, in her opinion, two of the charges in count three of the indictment relating to war crimes, namely

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been be sufficient to encompass rape and other sexual forms of violence. She gives various examples, such as the fact that one of the defendants’ had ‘knowledge of the brutal treatment and terror to which the Eastern people were subjected’. Another instance mentioned by her is of a defendant who was found to be a ‘willing and knowing participant in the use of terrorism in Poland ...’ Luping ‘Investigation and prosecution of sexual and gender-based crimes’ (2009) 17 *Journal Of Gender, Social Policy And The Law* at 442.

<sup>167</sup> Rhonda Copelon ‘Surfacing gender: Re-engraving crimes against women in humanitarian law’ (1994) 5 *Hastings Women’s Law Journal* 243 at 243.

<sup>168</sup> *Idem* at 665 (stating that ‘rape’ does not appear in the judgment of the IMT which consisted of 179 pages. and that rape was ‘folded into the general category of ‘ill-treatment of the civilian population.’). But compare Askin ‘A decade of the development of gender crimes’ at 16 (stating that though a notable amount of evidence relating to sex crimes had been recorded by the IMT and IMTFE, not much reference was made to gender crimes in judgments.) See also Kelly D Askin ‘Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles’ (2003) 21 *Berkeley Journal of International Law* 288 at 301 (where Askin states that even though there was a lot of documentation relating to sexual violence in World War II and the occupation of Germany, the prosecutors did not expressly prosecute these crimes. She states however, that much evidence relating to sexual violence was contained in the trial records). See pages 34 and 35 relating to this. See International Military Tribunal (Nuremberg) Judgment of 1 October 1946.

<sup>169</sup> See page 35 below. Askin ‘Prosecuting wartime rape and other gender-related crimes’ at 301. Also Judith Gardam and Michelle Jarvis *Women, armed conflict and international law* (2001) Springer Netherlands at 227.

<sup>170</sup> The articles referred to in the 1907 Hague Convention are Articles 46, 50, 52 and 56. Under the 1929 Geneva Convention they are Articles 2, 3, 4, 46 and 51. International Military Tribunal, Nuremberg, Trial of The Major War Criminals, Judgment of 1 October 1946 (22 August 1946 to 1 October 1946) at 79, available at [https://crimeofaggression.info/documents/6/1946\\_Nuremberg\\_Judgement.pdf](https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf) (accessed 25 June 2018).

<sup>171</sup> Askin ‘War crimes against women’ at 163.

‘[a]bduction of the civilian population of occupied territories into slavery and for other purposes’ and ‘... devastation unjustified by military necessity’, could have embodied sexual assault.<sup>172</sup> This would have come within the term ‘ill-treatment’ in the article.<sup>173</sup> Askin, however, does not dispute the IMT’s conviction of persons who committed war crimes against prisoners of war who were maltreated.<sup>174</sup> Like Askin, Bassiouni is of the opinion that rape and other sexual assault crimes constitute war crimes under article 6(b) of the Charter, as they are implicitly covered by this term.<sup>175</sup>

The ‘first concrete formulation’ of the term ‘crimes against humanity’ is found in article 6(c) of the Charter.<sup>176</sup> The drafters thought it was necessary to include this crime in the Charter to cover crimes committed by the Germans which could not be prosecuted as war crimes.<sup>177</sup> The crimes which were prosecuted as crimes against humanity were crimes which the German perpetrators committed against German victims of ‘the same nationality as their oppressors or against citizens of a state allied with Germany’.<sup>178</sup> With regard to the charge of crimes against humanity provided for in article 6(c) of the Charter, Askin and Bassiouni are of the same opinion that rape could have been covered under the words ‘other inhumane acts’.<sup>179</sup> Before World War II, crimes listed in article 6(c) of the Charter, excluding ‘persecution *per se*’, were acknowledged as crimes within the criminal legal systems of major states of the world. Such crimes, for example, were classified as murder, manslaughter and rape.<sup>180</sup> It therefore follows that since rape was prohibited by the general principles of law of these systems, it could come under the term ‘other inhumane acts’.<sup>181</sup> Askin, however, concludes that sexual violence was implicitly recognised as torture by the IMT when it referred in its judgment to crimes which had been

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<sup>172</sup> *Idem* at 138.

<sup>173</sup> See also Niarchos ‘Women, war and rape’ at 665 citing *United States v Göring*, 22 Trial of the Major War Criminals Before the International Military Tribunal, 411, 491 (1948)

<sup>174</sup> Askin ‘War crimes against women’ at 139.

<sup>175</sup> Bassiouni is of the same opinion with regard to the International Military Tribunal for the Far East (IMTFE), that this could have been covered under article 5(b) of its Charter. Bassiouni *Crimes against Humanity in International Criminal Law* at 348.

<sup>176</sup> Gardam and Jarvis ‘Women, armed conflict and international law’ at 78. Beth Van Schaack ‘The definition of Crimes Against Humanity: Resolving the incoherence’ (1998) 37 *Columbia Journal of Transnational Law* 787

<sup>177</sup> Schaack ‘The definition of Crimes against Humanity’ at 787.

<sup>178</sup> *Ibid.*

<sup>179</sup> Askin ‘War crimes against women’ at 142. Bassiouni also makes the same comment when referring to the IMTFE. In his opinion rape at the IMTFE could have been prosecuted under article 5(c) of its Charter under the term ‘other inhumane acts.’ *Idem* at 344.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

committed by the Germans. In support of this argument she cites, as example, the IMT judgment stating that:

Many women and girls in their teens were separated from the rest of the internees . . . and locked in separate cells, where the unfortunate creatures were subjected to particularly outrageous forms of torture. They were raped, their breasts cut off . . . ’

[W]omen were subjected to the same treatment as men. To the physical pain, the sadism of the torturers added the moral anguish, especially mortifying for a woman or a young girl, of being stripped nude by her torturers. Pregnancy did not save them from lashes. When brutality brought about a miscarriage, they were left without any care, exposed to all the hazards and complications of these criminal abortions.<sup>182</sup>

Despite the wealth of evidence before the IMT of rape and sexual assault, the tribunal’s failure to prosecute these gender-specific crimes was glaring. Askin offers two explanations for this: first, that the tribunal may have thought it unnecessary to prosecute ‘specific instances of individual acts against named individuals’ due to the wealth of evidence proving crimes on a massive scale which was ample to convict the defendants.<sup>183</sup> Moreover Askin argues that the IMT seemed more comfortable prosecuting crimes against peace, rather than war crimes or crimes against humanity, as the tribunal considered waging aggressive war to be the ‘supreme crime,’ and appeared to be less concerned with prosecuting gender specific crimes.<sup>184</sup> Askin’s second argument for not focusing on prosecuting gender specific crimes was that it would have forestalled prosecuting the defendants for the same offences which members of the Allied governments were guilty of committing.<sup>185</sup> Bassiouni, on the other hand, based his theory on the fact that prejudice and poor understanding of sexual violence prevented the prosecution of this crime and its inclusion in international treaties – although this was slowly changing.<sup>186</sup> This

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<sup>182</sup> Askin ‘Prosecuting wartime rape and other gender-related crimes’ at 301, referring to the IMT’s judgment.

<sup>183</sup> Askin ‘War crimes against women’ at 139.

<sup>184</sup> *Idem* at 135-142. Askin ‘A decade of the development of gender crimes’ at 16. In a later article of hers, Askin elaborates by stating that gender-related crimes were included as part of the trial evidence, even though it was not explicitly done, and as a result could be said to be subsumed within the tribunal’s judgments. She gives as an example the tribunal implicitly recognising sexual violence as torture. Askin ‘Prosecuting wartime rape and other gender-related crimes’ at 301.

<sup>185</sup> *Idem* at 163.

<sup>186</sup> Bassiouni *Crimes against Humanity in International Criminal Law* at 345. Also is the fact that rape and sexual violence are normally considered abnormal acts which normally occur in private. This may be the reason why, when the French prosecutor was presenting his evidence on rape, that Brownmiller describes how uncomfortable he was by stating that when he ‘shifted through his documents’, he adopted ‘the standing censoring mechanism that men employ when dealing with the rape of women. . . . “The Tribunal will forgive me if I avoid citing the atrocious details,” he said with gallantry. “A medical certificate from Doctor Nicolaides who examined the women who were raped in this region – I will pass on.” ’ Susan Brownmiller *Against our will: Men, women and rape* (1975) Simon

reasoning may be supported by the fact that the prosecuting lawyers came from different legal jurisdictions, and the trial was conducted in four different languages; English, Russian, French, and German.

Sellers' report disagrees with other scholars on the exclusion of evidence of sexual violence before the IMT. From the final decisions of the tribunal, she states that it was clear that the judges 'deliberated upon evidence of sex-based crimes and that such evidence indeed shaped the judgment'.<sup>187</sup> She goes on to state that the IMT indictments and its decisions 'are complete with proscriptions that capture mid-twentieth-century legal culture as applied to sexual violence'.<sup>188</sup> Sellers cites article 3 of the Geneva Convention 1929<sup>189</sup> as an example of the legal basis on which the IMT secured convictions in cases of rapes against military nurses and personnel who were imprisoned and ill-treated.<sup>190</sup>

In contrast to the IMT, national military courts were established to prosecute war criminals from Germany who had committed crimes of a lesser degree, compared to those prosecuted at the IMT.<sup>191</sup> The authority for these prosecutions arose from the Allies promulgating Allied Control Council Law 10 (CCL 10)<sup>192</sup> in exercise of their sovereignty over Germany.<sup>193</sup> German war criminals were to be prosecuted in the courts of the territories where

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and Schuster at 56. After referring to Brownmiller's description of the French prosecutor, Niarchos, points out that the Soviet Union's prosecutor was bolder in presenting his evidence. Niarchos 'Women, war and rape' at 664.

<sup>187</sup> Sellers 'The cultural value of sexual violence' at 319.

<sup>188</sup> *Ibid.*

<sup>189</sup> Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (hereinafter the Third Geneva Convention), art 3 which provides that '[p]risoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex. Prisoners retain their full civil capacity.'

<sup>190</sup> Sellers 'The cultural value of sexual violence' at 319. See also Sellers 'The prosecution of sexual violence in conflict' at 7 (stating that the IMT and the Tokyo Tribunal admitted and ruled upon evidence of rapes, even though the lingering legacy of the Nuremberg Tribunal remains one of inattention to sex based crimes.' She states that the forced deportation of 500 000 females, in the IMT's judgment, should have been 'examined as a gender-based crime of massive female enslavement. Luping concurs, by stating that though rape was not explicitly referred to in the IMTs indictment, its transcripts show that rape was prosecuted. Luping 'Investigation and prosecution of sexual and gender-based crimes' at 441.

<sup>191</sup> Although these criminals committed heinous crimes they did not instigate the war like those who were tried at the IMT. Campanaro 'Women, war and international law' at 2565. Those indicted 'were Nazi leaders who 'played central roles in the crimes perpetrated, including doctors, judges, industrialists and government and military leaders. Theodor Meron 'Reflections on the prosecution of war crimes by international tribunals' (2006) 100 *American Journal of International Law* 551 at 562.

<sup>192</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity.

<sup>193</sup> Mahmoud Cherif Bassiouni 'From Versailles to Rwanda in seventy-five years: The need to establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal* 11 at 29.

they committed the crimes.<sup>194</sup> Though CCL 10 was modelled on the IMT Charter,<sup>195</sup> with regard to sexual offences, rape was included as a crime against humanity.<sup>196</sup> Copelon states that rape was not prosecuted although it was listed as a crime against humanity. She believes that this could have been because the Allied forces were also guilty of this crime.<sup>197</sup> Askin on the other hand, states that gender crimes were casually treated in these trials. Crimes such as unethical experiments performed by medical doctors, and forced sterilisation and abortion by the guards of the concentration camps, were mentioned at these trials.<sup>198</sup> Although Sellers points out that hardly any cases of rape, if any, were prosecuted as a crime against humanity by these military courts, she adds that most of the concentration camp cases ‘confirmed . . . the gender-based violence aspect of forced sterilization, castrations and fertility experiments’ that were carried out on men and women in most of the camps by the Germans.<sup>199</sup>

### 2.2.2 The International Military Tribunal for the Far East (IMTFE)

The IMTFE, also known as the Tokyo Trial, was established to try war criminals, either individually or those who were members of organisations or in both capacities, with offences which included crimes against peace.<sup>200</sup> Whilst the war criminals prosecuted at the IMT were from Europe, those prosecuted at IMTFE were Japanese top military, political and diplomatic leaders.<sup>201</sup> Its establishment flowed from the implementation of the Cairo Declaration of

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<sup>194</sup> Jackson Moogato ‘The work of national military tribunals under Control Council Law 10’ in Jose Doria et al (eds) *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blishchenko* (2009) 51. Bassiouni ‘From Versailles to Rwanda in seventy-five years’ at 29. Control Council Law No. 10, was the governing instrument to try those who had committed crimes of a lesser degree in the ‘European theatre’. Other military tribunals to try minor axis criminals were also established in the ‘Asia-Pacific theatre’. Sellers ‘The prosecution of sexual violence in conflict’ at 8.

<sup>195</sup> *Ibid.*

<sup>196</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art II(1)(c).

<sup>197</sup> Copelon ‘Surfacing gender’ at 244. Rhonda Copelon ‘Gender crimes as war crimes: Integrating crimes against women into international criminal law’ (2000-2007) 46 *McGill Law Journal*. 217 at 221. Campanaro ‘Women, war and international law’ at 2565 (stating that rape was not included as a crime in the indictments, even though there was substantial evidence of sexual abuse. This she states proves the lack of recognition given to sexual violence).

<sup>198</sup> Askin ‘Prosecuting wartime rape and other gender-related crimes’ at 302.

<sup>199</sup> Sellers ‘The prosecution of sexual violence in conflict’ at 8.

<sup>200</sup> *Ibid.* Whilst rape was hardly prosecuted in the ‘European theatre’, this can be compared with the Asia-Pacific theatre where rape was prosecuted as a war crime. See also Charter of the International Military Tribunal for the Far East, Dated at Tokyo January 19, 1946, amended April 26, 1946, TIAS 1589: 4 Bevans 20, arts 1 and 5. At the IMT individual persons and organisations were tried but the IMTFE Charter made no provision for the trial of organisations alleged to be criminal.

<sup>201</sup> Charter of the International Military Tribunal for the Far East. Askin *War crimes against women* at 165.

December 1, 1943,<sup>202</sup> the Potsdam Declaration of July 26, 1945,<sup>203</sup> the Instrument of Surrender of September 2, 1945,<sup>204</sup> and the Moscow Conference of December 26, 1945.<sup>205</sup> At the Moscow Conference, held between 16 and 26 of December, 1945 the governments of the United States, Great Britain and the Union of Soviet Socialist Republics (Soviet Union) agreed *inter alia*, with the concurrence of China, that the orders for implementation of the Terms of Surrender, the occupation and control of Japan and directives relating thereto should be issued by the Supreme Commander of the Allied Powers.<sup>206</sup> Based on this power, General Douglas MacArthur by Special Proclamation established the IMTFE, on January 19 1946.

The IMTFE Charter (modelled after the IMT Charter) was issued on the same day as the Proclamation. It was amended on 26 April, 1946 to include the addition of two judges, from India and the Commonwealth of the Philippines, to the nine originally chosen.<sup>207</sup> The provision for two judges from Asia was to give that region the opportunity to judge the Japanese for the

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<sup>202</sup> The Cairo Declaration was a document made by the United States President, Franklin Roosevelt, the British Prime Minister, Winston Churchill and the President of the Republic of China, Chiang Kai-shek following the Cairo Conference which was held in Cairo, Egypt. Some of the provisions in the Declaration were that the three Allied nations would continue to wage war against Japan until it surrendered unconditionally, that Japan would be stripped of all the Pacific islands seized or occupied since the beginning of World War I, the return to China of territories such as Manchuria, Formosa, and the Pescadores and Korea's freedom and independence from Japan. International Military Judgment of 4 November, 1948.

<http://crimeofaggression.info/2013/01/international-mi> (accessed 14 January 2015).

<sup>203</sup> The Potsdam Declaration, also referred to as the 'Proclamation Defining Terms for Japanese Surrender', is a statement, (made by the same Allied powers) calling for Japan's surrender, the punishment of all war criminals. It was subsequently adhered to by the Union of Soviet Socialist Republics (Soviet Union). Paragraph 8 reference states that the terms of the Cairo Declaration should be carried out. When Japan failed to surrender, Harry S. Truman who had now become the President of the United States, ordered the atomic bombing of Hiroshima and Nagasaki, two of Japan's cities. This order was carried out on the 6 and 9 August 1945. Potsdam Declaration [www.princeton.edu/~achaney/tmve/wik/100k/.../potsdam\\_Declaration.ht](http://www.princeton.edu/~achaney/tmve/wik/100k/.../potsdam_Declaration.ht)... (accessed 14 January 2015).

<sup>204</sup> This was the instrument by which Japan surrendered to the four Allied powers and commanded all its forces to cease hostilities, thus bringing World War II to an end in the Asian Pacific region. It was signed by behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters and also on behalf of the same nine Allied Powers. International Military Judgment of 4 November, 1948. First Instrument of Surrender, 2 September 1945 [www.taiwodocuments.org/surrender01.htm](http://www.taiwodocuments.org/surrender01.htm) (accessed 14 January 2015).

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.* Communiqué on the Moscow Conference of the three foreign ministers, signed at Moscow on 27 December 1945, and report of the meeting of the ministers of foreign affairs of the Union of Soviet Socialist Republics, the United States and the United Kingdom, dated 26 December 1945, together constituting an agreement relating to the preparation of Peace Treaties and to certain other problems available at [www.ungarisches-institut.de/dokumente/pdf/19451227-1.pdf](http://www.ungarisches-institut.de/dokumente/pdf/19451227-1.pdf) (accessed 14 January 2015).

<sup>207</sup> The nine judges came from those countries which were the signatory powers that signed the Instrument of Surrender of September 2, 1945. The judges from the United States and France were replaced as the original ones resigned.



brutal atrocities it suffered under them.<sup>208</sup> Critics of the IMTFE have noted America's domination over the trial and other aspects relating to the IMTFE.<sup>209</sup> Also, it was considered to be out of place for colonial nations such as France, Britain and the Netherlands to judge Japan for its colonial ambitions.<sup>210</sup> In their opinion, there should have been more judges from Asia, including Korea, which had been 'brutally' colonised by Japan for over 30 years.<sup>211</sup> In his judgment and subsequent article, Justice Bert Röling, one of the judges who presided over the trial, said the judges should have come from neutral countries and from Japan, as their presence 'would have had a favourable influence'.<sup>212</sup>

The crimes within the jurisdiction of the IMTFE; that is, crimes against peace, crimes against humanity and conventional war crimes, though similarly titled to those contained within the IMT Charter, are worded differently in some respects.<sup>213</sup> The 28 selected Class A war criminals<sup>214</sup> were indicted on 55 separate counts (as opposed to the IMT which had four counts),

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<sup>208</sup> Allison M Danner 'Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in prosecuting war and terrorism' (2005-2006) 46 *Virginia Journal of International Law* 83 at 89. Maria H Chang and Robert P Barker 'Victor's justice and Japan's amnesia: The Tokyo war crimes trial reconsidered' (2001) 19 *East Asia* 55 at 73.

<sup>209</sup> *Ibid. Idem* at 63.

<sup>210</sup> *Ibid.*

<sup>211</sup> Chang and Barker 'Victor's justice and Japan's amnesia' at 73.

<sup>212</sup> Justice Bert Röling was from The Netherlands. His comment was with regard to the Nuremberg and Tokyo Tribunals. He was also of the opinion that the same should have applied in the case of the Nuremberg trial, that is, the appointment of neutral judges at Nuremberg and also from Germany. Bert V A Röling 'Aspects of the criminal responsibility for violations of the laws of war' in Antonio Cassese (ed) *The New Humanitarian Law of Armed Conflict* (1979) at 200. Onuma Yasuaki 'The Tokyo Trial: Between Law and Politics' available at [www.olemiss.edu/courses/inst203/onuma86.pdf](http://www.olemiss.edu/courses/inst203/onuma86.pdf) (accessed 15 January 2015).

<sup>213</sup> Under article 5(a), crimes against peace is defined as 'the planning, preparation, initiation or waging of a declared or undeclared war or aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. Article 5(b) defines conventional war crimes as 'violations of the laws or customs of war.' Article 5(c) defines crimes against humanity as 'murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices in the formulation or execution of a plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan' – article 5 of the Charter of the International Military Tribunal for the Far East Charter. The phrase 'against any civilian population' was deleted from the definition of crimes against humanity in the IMTFE Charter, while the phrase exists in the IMT Charter on which it was modelled. Askin states that this broadened the classes of crimes which might be punished. See Askin *War crimes against women* at 166.

<sup>214</sup> Selected from 80 war criminal suspects, including nine civilians and 19 soldiers. Askin quotes Minear on the criteria for selecting the defendants, that the group of accused represent branches of the Japanese Government and were 'principal leaders' in the various phases of the period covered by the indictment; with 'primary responsibility' for the acts committed and against whom there were 'overwhelming cases'. *Idem* at 169 citing Richard H. Minear 1971 'Victors' justice: The Tokyo War Crimes Trial' at 10-11.

between the periods of 1 January 1928 and 2 September 1945.<sup>215</sup> Due to the complexity of these counts they were grouped into three: crimes against peace (Group I: counts 1–36); murder Group II: counts 37–52) and conventional war crimes or crimes against humanity (Group III: counts 53–55).<sup>216</sup> The trial which commenced on 3 May 1946 was factually gruesome and finally ended on November 4, 1948, taking two and a half years to complete.<sup>217</sup> At the end of the trial 25 of the 28 war criminals were convicted and sentenced.<sup>218</sup> Seven of them were sentenced to death by hanging, 16 to life imprisonment, and a number of others were imprisoned for 20 years. The last category of those tried was sentenced to seven years imprisonment.<sup>219</sup>

Gender specific sex crimes were committed by the Japanese during World War II. Although the Charter did not specifically list rape as a crime, some of the defendants were charged with other crimes along with rape under the category of war crime.<sup>220</sup> Yet, scholars have pointed to the fact that, like its counterpart, the IMT, the IMTFE ‘largely neglected sexual violence’,<sup>221</sup> or failed to adequately prosecute it and other sexual violence crimes.<sup>222</sup> In

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<sup>215</sup> International Military Tribunal Judgment of 4 November, 1948.

<sup>216</sup> International Military Tribunal for the Far East. Dissident Judgment of Justice Pal, Kokusho – Kankokai, Inc., Tokyo, 1999 available at [www.cwporter.com/pal1.htm](http://www.cwporter.com/pal1.htm) (accessed 15 January 2015). Caroline J K S Picart ‘Attempting to go beyond forgetting: The legacy of the Tokyo International Military Tribunal and crimes of violence against women’ (2012) 7 *East Asia Law Review* 1 at 24.

<sup>217</sup> The President of the Tribunal, Justice Webb, who was from Australia, had explain why the trial was lengthy, in conflict with the spirit of the provisions of articles 12(a) and (b) of the Charter, which provided for the trial to be confined to an ‘*expeditious hearing of the issues raised by the charges*’ and without ‘*any unreasonable delay*’. [emphasis added] International Military Tribunal judgment of 4 November, 1948.

<sup>218</sup> Two of the defendants died during the trial and proceedings were suspended against another declared mentally unfit to stand trial (released in 1948). International Military Tribunal Judgment of 4 November, 1948.

<sup>219</sup> Three of the defendants who were sentenced to life imprisonment died in prison between 1949 and 1950. The remaining 13 prisoners were granted parole between 1954 and 1956. Of the two prisoners who had lesser sentences, one died in prison and the other was granted parole in 1950 and became the Foreign Minister of Japan in 1954. See U S Department of State Office of the Historian, *The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)*.

<sup>220</sup> Askin ‘Prosecuting wartime rape and other gender-related crimes’ at 302. Meron ‘Rape as a crime under international humanitarian law’ at 87 (stating that those defendants who were prosecuted for war crimes which included rape were found guilty because they failed to ensure that their subordinates did not contravene international law. By including rape with other crimes in the indictment, the indictment contemplated acts ‘carried out in violation of recognised customs and conventions of war . . . murdering, maiming and ill-treating prisoners of war (and) civilian internees . . . forcing them to labour under inhumane conditions . . . plundering public and private property, wantonly destroying cities, towns and villages beyond any justification of military necessity, (perpetrating) mass murder, rape, pillage, brigandage, torture and other barbaric cruelties upon the helpless civilian population of the over-run countries’. *Prosecutor v Furundzija*, Trial Judgment (10 December 1998) IT-95-17/1/T para 168 (pointing out that Generals Toyoda and Matsui were convicted of command responsibility for war crimes committed by their soldiers in Nanking, including widespread rapes and sexual assault. Hirota, the former Foreign Minister, was also convicted for rape and sexual assault). See below.

<sup>221</sup> *Idem* at 288.

Campanaro's view the failure to specifically list sexual assault crimes within the tribunal's Charter reduced rape to a minor crime, and reinforced the fact that historically rape had been considered to be an insignificant crime.<sup>223</sup> Sexual assault crimes were only considered by the prosecution after a defendant had been charged with other crimes.<sup>224</sup> The particulars of breaches in the indictment relating to rape were drafted as follows:

## SECTION ONE

Inhumane treatment, contrary in each case to Article 4 of the said Annex to the said Hague Convention and the whole of the said Geneva Convention and to the said assurances. In addition to the inhumane treatment alleged in Sections Two to Six hereof inclusive, which are incorporated in this Section, prisoners of war and civilian internees were murdered, beaten, tortured and otherwise ill-treated, and female prisoners were raped by members of the Japanese forces.

## SECTION FIVE

Mistreatment of the sick and wounded, medical personnel and female nurses, contrary to Articles 3, 14, 15 and 25 of the said Geneva Convention and Articles 1, 9, 10 and 12 of the said Red Cross Convention, and to the said assurances:

.....

(c) Female nurses were raped, murdered and ill-treated,

Failure to respect family honour and rights, individual life, private property and religious convictions and worship in occupied territories and deportation and enslavement of the inhabitants thereof, contrary to Articles 46 of the said Annex to the said Hague Convention and to the Laws and Customs of War: Large numbers of the inhabitants of such territories were murdered, tortured, raped and otherwise ill-treated, arrested and interned without justification, sent to forced labour, and their property destroyed or confiscated.<sup>225</sup>

Thus rape and other crimes were classified as 'inhuman treatment,' ill-treatment' and 'failure to respect family honour and rights'. The crime of rape which the Allied prosecutors successfully

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<sup>222</sup> Copelon 'Gender crimes as war crimes' at 221. The reason why the IMTFE has been criticised for failing to deal adequately with sexually violence crimes, is because the Tribunal did not prosecute the defendants for sexual slavery which the Japanese imperial army committed. See below for an explanation of this.

<sup>223</sup> Campanaro 'Women, war and international law' at 2564.

<sup>224</sup> *Ibid.*

<sup>225</sup> International Military Tribunal for the Far East, Judgment of 4 November 1948. See also Askin *War crimes against women* at 180.

prosecuted related to atrocities committed in the Chinese capital city of Nanking in December 1937<sup>226</sup>. Before its invasion by the Japanese Imperial Army, the Chinese nationalist forces had pulled out of Nanking, moving westward, thus, making Hankow its new capital.<sup>227</sup> Those who had the means to leave also left, 'leaving the poorer classes and a small number of foreign missionaries defenceless'.<sup>228</sup> Brownmiller, describes the 'Rape of Nanking' as it is popularly referred to, as an 'orgy of wholesale assault against the. . . civilian population.'<sup>229</sup> Iris Chang, in giving an account of the heinous crimes committed during the six weeks of the raping in Nanking states that:

Chinese men were used for bayonet practice and in decapitation contests. An estimated 20 000-80 000 Chinese women were raped. Many soldiers went beyond rape to disembowel women, slice off their breasts, nail them alive to walls. Fathers were forced to rape their daughters, and sons, their mothers, as other family members watched. Not only did live burials, castration, the carving of organs and the roasting of people become routine, but more diabolical tortures were practiced, such as hanging people by their tongues on iron hooks or burying people to their waists and watching them get torn apart by German shepherds."<sup>230</sup>

In drawing attention to the high number of those who were raped, Wood makes reference to Chang's calculations. Chang, she states, calculated that the 20 000-80 000 thousand women (and girls) who were raped were 8-32% of the 250 000 female civilians in Nanking at that time.<sup>231</sup> However, Wood, points out that it is not clear how Chang arrived at this figure.<sup>232</sup> In its judgment, the Tribunal referred to the rape of Nanking by concluding that '[i]ndividual soldiers and small groups of two or three roamed over the city murdering, raping, looting and burning.'<sup>233</sup>

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<sup>226</sup> Brownmiller *Against our will: Men, women and rape* at 57.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Idem* at 61. International Military Tribunal for the Far East, dissentient judgment of Justice Pal relating to the rapes which occurred in Nanking, found it difficult to believe the evidence of those witnesses who gave evidence in court. In his opinion their evidence was distorted and exaggerated. He should have at least been able to conclude that rape did occur, in the light of other evidence ie an eye-witness statement of rapes read into the record. Also an American missionary stated that at least one thousand cases of rape occurred at night and many during the day. Also Major Yasuto Nakayama, who was an intelligence officer, stated that he believed that several cases of rape occurred to a limited extent and apologised for that. In Askin's opinion, Justice Pal's remarks relating to the evidence were 'disturbing and illuminating' and it appeared that he had great difficulty in finding that rape had been committed. Askin *War Crimes Against Women* at 189.

<sup>229</sup> *Idem* at 57.

<sup>230</sup> Picart 'Attempting to go beyond forgetting' at 27 quoting Iris Chang (1997) *The Rape of Nanking: The forgotten Holocaust of World War II* (1998) Basic Books at 6. Chang and Barker 'Victor's justice and Japan's amnesia' at 68 quoting Iris Chang *The Rape of Nanking: The forgotten Holocaust of World War II* at 6

<sup>231</sup> Elizabeth J Wood 'Variation in sexual violence during war' (2006) 34 *Politics & Society* 307 at 311.

<sup>232</sup> *Ibid.*

<sup>233</sup> International Military Tribunal for the Far East, judgment at 494.

The Tribunal further stated, in one paragraph when referring to the gender crimes which occurred in Nanking that<sup>234</sup>

... many cases of rape occurred. Death was a frequent penalty for the slightest resistance on the part of a victim or the members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city, and many cases of abnormal and sadistic behaviour in connection with these raping's occurred. Many women were killed after the act and their bodies mutilated. ... Approximately 20 000 cases of rape occurred within the city during the first month of the occupation.<sup>235</sup>

Torture by way of burning victims or electric shocks was also used as a means of sexual violence on the prisoners of war and civilian internees. The application of electric current on a sensitive part of the body such as the nose, ears, sexual organs or breasts, was carried out.<sup>236</sup> In later years the two *ad hoc* tribunals and the ICC acknowledged that rape by torture could be a form of sexual violence.<sup>237</sup>

Justice Pal's dissenting judgment also gave an account of the rape which occurred at Nanking. His judgment and Chang's research not only cited gender-based crimes committed against the Chinese female population, but also those against men who were forced to rape members of their families, which the prosecutor at the IMTFE did not consider prosecuting. This is not surprising, considering the fact that the charges brought against the defendants for rape committed against the women and girls were only brought when they had been charged with other crimes.<sup>238</sup> Justice Pal's dissenting judgment suggested that rapes alleged to have been committed by the Japanese had been exaggerated.<sup>239</sup> Sellers used the same arguments as that put forward for the IMT, that the judges considered the evidence of sex-based crimes, which shaped the IMTFE judgment. She was of the opinion that the fact the Tribunal disregarded Justice Pal's dissenting judgment implied that the Japanese misconduct in respect of the rapes committed in Nanking had been exaggerated was proof of the studied consideration given to sex-based crimes.<sup>240</sup> However, the Tribunal, subsumed the rape crimes under the command responsibility

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<sup>234</sup> See Richard J Goldstone 'Prosecuting rape as a war crime' (2009) 34 *Case Western Reserve Journal of International Law* 227 at 279 (stating that IMTFE 'devotes one paragraph in the opinion to the gender crimes that came to be named the "Rape of Nanking"').

<sup>235</sup> International Military Tribunal for the Far East, Judgment at 495.

<sup>236</sup> *Idem* at 517.

<sup>237</sup> See sections 2.3 and 2.4.2.

<sup>238</sup> Campanaro 'Women, war and international Law' at 2564.

<sup>239</sup> International Military Tribunal for the Far East, Dissident Judgment of Justice Pal.

<sup>240</sup> Sellers 'The cultural value of sexual violence' at 319-320.

charges. In applying the command responsibility principle for crimes which included rape, the Tribunal prosecuted and convicted General Iwane Matusi, Commander Shunroku Hata and Koki Hirota, who was the Japanese Foreign Minister from 1933 to 1938. Hirota was the first civilian person convicted under this regime for crimes committed by soldiers who were under his authority. With regard to the rapes of Nanking, the Tribunal found that the War Ministry of which Hirota was in charge gave assurances that the atrocities occurring in Nanking would stop. However, the atrocities continued and the Tribunal found that Hirota

... was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.<sup>241</sup>

Thus, instead of preferring charges rape and other sexual atrocities in their own right, the Tokyo Tribunal used the evidence which it had of these crimes to support the charges of crimes against humanity.<sup>242</sup>

Although the IMTFE applied the command responsibility theory to adjudicate the crime of rape and other crimes which occurred in Nanking, the Tribunal did not convict defendants on evidence of sexual slavery committed by the Japanese Imperial Army.<sup>243</sup> Goldstone, in expressing his disappointment at the non-prosecution of these crimes, states that the Tribunal ‘completely ignored the equally notorious forcing of thousands of comfort women into prostitution in Japanese military motels’.<sup>244</sup> Two hundred thousand women and girls

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<sup>241</sup> International Military Tribunal for the Far East, Judgment at 564.

<sup>242</sup> Gardam and Jarvis ‘Women, armed conflict and international law’ at 207.

<sup>243</sup> Kelly D Askin ‘Comfort women – shifting shame and stigma from victims to victimizers’ (2001) 1 *International Criminal Law Review* 5 at 6. The only trial where comfort women successfully prosecuted Japanese army officers and comfort station operators was the Batavia (Indonesia) Trial. Twelve Japanese army officers were tried in a court at Batavia for raping thirty five Dutch “comfort women” in Indonesia. They were charged with war crimes and defying the laws and customs of war, in the Dutch East Indies in 1944. Women’s Caucus for Gender Justice ‘Toward the Tokyo Tribunal 2000 and public hearing on crimes against women’ available at [www.iccwomen.org>Home>Tokyo Tribunal](http://www.iccwomen.org/Home>Tokyo_Tribunal) (accessed 16 January 2015). Zhang Wanhong ‘From Nuremberg to Tokyo: Some reflections on the Tokyo trial (on the sixtieth anniversary of the Nuremberg trials)’ (2005-2006) 27 *Cardozo Law Review* 1673 at 1675. Lee’s figures contradicts that of above, in that she states 11 defendants were convicted out of the 13 originally charged. Sue R Lee ‘Comforting the comfort women: Who can make Japan pay?’ (2003) 24 *University of Pennsylvania Journal of International Economic Law* 509 at 532. Beth Van Schaack ‘Engendering genocide: The Akayesu case before the International Criminal Tribunal for Rwanda’ (2008) available at <http://digitalcommons.law.scu.edu/facpubs/629> (accessed 16 January 2015).

<sup>244</sup> Goldstone ‘Prosecuting rape as a war crime’ at 279.

(euphemistically referred to as comfort women),<sup>245</sup> mostly from Korea, as well as from other Asian countries such as the Philippines, Malaysia, China and Japan were lured, abducted or forced to become sexual slaves.<sup>246</sup> Refusal to comply with the soldiers' demands, resulted in their being beaten or murdered in a gender specific way, such as, being raped with broken glass or with a crude weapon or having their sexual organs or bodies maimed.<sup>247</sup> The comfort stations devised by the Japanese, which in reality were military brothels, were intended to prevent reports of rapes committed by them in their occupied territories from spreading internationally.<sup>248</sup> They were also established to prevent the spread of venereal diseases, to provide comfort for the soldiers, to forestall the soldiers from committing rape outside these stations and also to prevent espionage.<sup>249</sup> This, however, did not prevent them from carrying out widespread rapes in their occupied territories.<sup>250</sup>

The sexual crimes committed by the Japanese Imperial Army could have been prosecuted by the IMTFE, under article 5(c) of the Charter as crimes against humanity. Instead, the IMTFE

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<sup>245</sup> *Idem* at 14-15 and 20 (Askin asserts that the word 'comfort' gives the wrong impression of 'solace and care' when in actual fact the women were tortured and beaten if they refused to submit to the soldiers demands for sex. She also points out that in such situations prostitutes can be raped and thus should not be treated differently from rape victims). It is estimated that 80% of those from Korea were between 14 to 18 years of age. Picart 'Attempting to go beyond forgetting' at 29. Wood 'Variation in sexual violence during war' at 311. Apart from being repeatedly raped, up to 40 times a day, these women were also expected to provide domestic services to the Japanese soldiers. Copelon 'Gender Crimes as War Crimes' at 222.

<sup>246</sup> *Idem* at 30. Based on research carried out mostly on Korean comfort women and their Japanese counterparts, Soh claims that their 'victimisation was partly a result of 'institutionalized . . .gender violence tolerated in patriarchal homes and enacted in public sphere' which was imbued in what she calls 'masculinist sexual culture.' C Sarah Soh *The Comfort Women: Sexual violence and Postcolonial memory in Korea and Japan* (2008) University of Chicago, Press, Chicago, at xii, 3.

<sup>247</sup> *Idem* at 20-21

<sup>248</sup> *Idem* at 12. Carmen M Argibay 'Sexual Slavery and the "Comfort Women" of World War II' (2003) 21 *Berkeley Journal of International Law* 375 at 376-377. The first comfort station was established in 1932, in Shanghai. Women's International War Crimes Tribunal 2000 for the Trial of Japan's Military Sexual Slavery, In the matter of *The Prosecutors and the Peoples of the Asia-Pacific Region v Emperor Hirohito et al. and the Government of Japan*, Summary of findings, 12 December 2000 para 20 available at [http://www.alpha-canada.org/.../themes/.../theme/.../WomenTribunal\\_Summary...](http://www.alpha-canada.org/.../themes/.../theme/.../WomenTribunal_Summary...) (accessed 20 January 2015). Lee 'Comforting the comfort women' at 509. Copelon is convinced the Allies were aware of the 'comfort women' but chose to turn a blind eye to it, based on discussions with a relative who was part of the Allied forces and documented writings from the military archive in Australia, in particular that of Ustina Dolgopol. Copelon 'Gender Crimes as War Crimes' at 222. Picart 'Attempting to go beyond forgetting' at 37 (Picart also tends states that the international community should have condemned the establishment of comfort stations. Their establishment and the crimes which arose from them should have been prosecuted by the IMTFE as crimes against humanity).

<sup>249</sup> *Idem* at 13. Picart 'Attempting to go beyond forgetting' at 30-31 and 38. Copelon 'Gender crimes as war crimes' at 222.

<sup>250</sup> Picart 'Attempting to go beyond forgetting' at 30-31 and 38.

focused more on prosecuting the defendants for crimes against the peace<sup>251</sup> and not prosecuting any of the defendants for crimes against humanity. Certain scholars have criticised the tribunal for not giving much attention to the various crimes committed against humanity,<sup>252</sup> citing ‘gender prejudice,’<sup>253</sup> and racism,<sup>254</sup> as the tribunal preferred to prosecute those crimes which favoured them. Expatiating on the scholars’ reasoning, they cited various examples, such as the experiences of the whites being more important to the tribunal than those of the Asians, whom the tribunal deliberately ignored as victims of crimes such as the atomic bombing of Hiroshima and Nagasaki by the Americans.<sup>255</sup> Totani differs from these views of ‘gender prejudice’ or racism, arguing that the prosecutors did provide evidence of sexual violence committed against Asian women, especially in China and Dutch East Indies,<sup>256</sup> but were not able to convince the judges that the crimes committed were the result of superior orders.<sup>257</sup> Totani’s argument, however, is found wanting in that she proceeds to admit that the Tokyo trial was a means to strengthen America’s interests and that of the colonial powers in Asia.<sup>258</sup>

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<sup>251</sup> *Idem* at 24. Askin ‘War Crimes Against Women’ at 185. Kirsten Sellars ‘Imperfect justice at Nuremberg and Tokyo’ (2010) 21 *European Journal of International Law* 1085 at 1100.

<sup>252</sup> Sellars refers to Awaya Kentaro, a Japanese historian: Sellars ‘Imperfect justice at Nuremberg and Tokyo’ in *Perspectives on the Nuremberg Trial* ed Guenael Mettraux 2008 Oxford University Press 1085 at 1100 referring to Awaya Kentaro’s criticisms. Chang and Barker ‘Victor’s Justice and Japan’s Amnesia’ at 75-76 (referring to Paik Choong-Hyun, a Professor at the Seoul National University and Justice Röling).

<sup>253</sup> *Ibid.*

<sup>254</sup> Chang and Barker ‘Victor’s Justice and Japan’s Amnesia’ at 75.

<sup>255</sup> *Idem* at 75-76 (referring to Paik Choong-Hyun, who believes that the Allied prosecutors were motivated by racism because the victims were Asians. They also refer to Justice Röling’s disapproval of the American military authority’s concealment of Unit 731 experiments (below) from the judges, as the Tribunal lost a rare opportunity to try what he refers to a ‘centrally organized war criminality’). Kentaro also criticises the prosecutors for failing to indict the Japanese Emperor Hirohito and ignoring the biological experiments, known as Unit 731, carried out by the Japanese in Manchuria on prisoners of war and civilians. Sellars ‘Imperfect Justice at Nuremberg and Tokyo’ at 1100 referring to Awaya Kentaro criticisms. Onuma Yasuaki ‘The Tokyo trial: Between law and politics.’ (January 2015).

<sup>256</sup> Sellars ‘Imperfect Justice at Nuremberg and Tokyo’ at 1100 referring to Yuma Totani, *The Tokyo War Crimes Trial* (2008) Harvard University Press at 178-179, 185. Picart ‘Attempting to go beyond forgetting’ at 34 referring to Yuma Totani, *The Tokyo War Crimes Trial*. In Sellars’ view the Allied prosecutors did not present evidence of this crime. Sellars ‘The prosecution of sexual violence in conflict’ (2008) OHCHR at 8. Niarchos agrees that the Tribunal did not receive evidence of the sexual atrocities relating to the comfort women. Niarchos ‘Women, war and rape’ at 666.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid* still referring to Totani, Picart, appears to reach a slightly different conclusion of Totani’s argument. Her reason for stating that Totani eventually reaches the same conclusion as her critics is because Totani eventually agrees with the argument that the Allied prosecutors did not consider prosecuting the Japanese for sexual crimes, which has resulted in their leaders escaping punishment for sexual slavery. Picart ‘Attempting to go beyond forgetting’ (2011) *East Asia Law Review* at 34.



Copelon reasons that the tribunal did not try the defendants for the crime of sexual slavery because women were seen as spoils of war.<sup>259</sup> It was easier for the tribunal to consider the ‘comfort stations’ as brothels, rather than rape camps and also deny the fact that the women were treated as sex slaves.<sup>260</sup> Moreover, the allies were just as guilty as Japanese soldiers.<sup>261</sup> She gives the example of the US military organising and directing their men to brothels.<sup>262</sup> Similarly, Argibay concurs that the words prostitute and/or prostitution derogatorily described the comfort women’s situation and recommended the term sexual slavery.<sup>263</sup>

Right from the start, the IMTFE was what Chang and Barker refer to as a ‘creature of political decision-making’.<sup>264</sup> Politics, therefore, would have played a part in how the tribunal decided which defendants to try and also the crimes to be tried. Many scholars have said that the Japanese Emperor Hirohito ought to have been tried.<sup>265</sup> As the supreme leader and commander of the Japanese Imperial Army, World War II was fought in his name and he would have been aware of the heinous crimes which the Japanese army was committing.<sup>266</sup> Unfortunately, Cold War politics overtook the politics of the IMTFE, as the allies were more concerned in getting the Japanese on their side.<sup>267</sup> Picart recounts Chang’s view on this point:

After the 1949 Communist revolt in China, neither the People’s Republic of China nor the Republic of China demanded wartime reparations from Japan (as Israel had from Germany) because the two governments were competing for Japanese trade and political recognition. And even the United States, faced with the threat of communism in the Soviet Union and mainland China, sought to ensure the friendship and loyalty of its former enemy, Japan. In this manner,

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<sup>259</sup> Copelon ‘Gender crimes as war crimes’ at 223.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> Argibay ‘Sexual slavery and the ‘Comfort Women’ of World War II’ (2003) 21 *Berkely Journal of International Law* at 386.

<sup>264</sup> Chang and Barker ‘Victor’s Lustice and Japan’s Amnesia’ at 63 citing J Colwill, ‘From Nuremberg to Bosnia and beyond: War crimes trials in the modern era’ (1995) 22-2 *Social Justice* 115

<sup>265</sup> Danner, considers this as the single most important decision which the United States officials had to make concerning the IMTFE. Danner ‘Beyond the Geneva Conventions’ (2005) 46 *Virginia Journal of International Law* at 89. Wanhong ‘From Nuremberg to Tokyo’ (2005-2006) 27 *Cardozo Law Review* at 1677 (referring to the United States decision not to prosecute the Emperor as a ‘calculated political decision’ in order to assist with the post-war occupation of Japan). Matsui, on the other hand refers to this decision as ‘an important political objective of the US Occupation forces . . .’ Yayori Matsui ‘Overcoming the culture of impunity for wartime sexual violence - The historical significance of the Women’s International War Crimes Tribunal 2000’ available at <http://www1.jca.apc.org/vaww-net-japan/english/worr> (accessed 14 January 2015).

<sup>266</sup> Eddy V Drom ‘Assessment of the 2000 Tokyo Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery’ available at [www.ronsyu.hannan-u.ac.jp/open/n002107.pdf](http://www.ronsyu.hannan-u.ac.jp/open/n002107.pdf) (accessed 14 January 2015). Wanhong, ‘From Nuremberg to Tokyo’ at 1675.

<sup>267</sup> *Ibid.* Danner ‘Beyond the Geneva Conventions’ at 92.

cold war tensions permitted Japan to escape much of the intense critical examination that its wartime ally [Germany] was forced to undergo.<sup>268</sup>

Thus, those crimes which the Japanese had committed were glossed over, particularly gender-violence crimes<sup>269</sup> which ought to have been punished as crimes against humanity. Picart describes the military pensions awarded – the Japanese government’s benefits to its soldiers – and non-compensation to the comfort women as a ‘second rape’ by the Allies.<sup>270</sup> Unlike Germany, which had acknowledged the crimes it committed during World War II and apologised for them, the Japanese government for many years continued to deny the crimes committed against these comfort women<sup>271</sup> It was only when the surviving comfort women started to speak out in the 1990s, and evidence of the crimes committed against them started to emerge, that the Japanese government finally admitted its moral responsibility relating to sexual slavery committed during World War II.<sup>272</sup> The government of Japan, nonetheless, continues to refuse its legal responsibility towards the comfort women, claiming that issues of wartime compensation had been settled with their respective countries and also that individuals have no right to claim reparations under international law.<sup>273</sup> The Women’s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery (Women’s Tribunal) was a people’s tribunal, based in Tokyo, Japan, from early December 2000.<sup>274</sup> It was established as an addendum to the IMTFE, to fill the gap which the Allies created, when they failed to try the defendants at the IMTFE for rape and sexual crimes committed against the comfort women by the Japanese army.<sup>275</sup> Thus, the Women’s Tribunal was established to clarify and assess Japan’s criminal liability towards the comfort women for sexual war crimes committed against them in the 1930s and 1940s and also to ‘end the cycle of impunity for wartime sexual violence and . . . prevent its

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<sup>268</sup> Picart ‘Attempting to go beyond forgetting’ at 25 citing I Chang *The Rape of Nanking* 5 (1997) 11.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Idem* at 29.

<sup>271</sup> Chang and Barker ‘Victor’s Justice and Japan’s Amnesia’ at 55-59.

<sup>272</sup> *Idem* at 56. Matsui, records that the Japanese government’s admitted to its moral responsibility in 1993 whereas other scholars refer to earlier dates. For example Chang and Baker state that Emperor Akihito’s eldest son apologised to the South Korean President in May 1990 and in 1992 Emperor Akihito apologised to China. Also writing in *the New York Times* of January 14, 1992, David Sanger states that the Japanese government admitted on that day that its army forced Korean women to be sex slaves for its soldiers. Matsui ‘Overcoming the culture of impunity for wartime sexual violence.’

<sup>273</sup> Christine M Chinkin ‘Women’s international tribunal on Japanese military sexual slavery’ (2001) 95 *American Society of International Law* 335 at 335. Though the surviving comfort women have brought civil lawsuits in the Japanese courts, they have been unsuccessful. Matsui ‘Overcoming the culture of impunity for wartime sexual violence.’

<sup>274</sup> *Ibid. Ibid.*

<sup>275</sup> Women’s International War Crimes Tribunal 2000 for the Trial of Japan’s Military Sexual Slavery, para 4.

reoccurrence'.<sup>276</sup> As the Supreme Commander of the Japanese Army and Navy, Emperor Hirohito was found guilty of responsibility for sexual slavery and rape as a crime against humanity by the tribunal.<sup>277</sup> Nine top military officials including government officials were also found guilty of the same crime.<sup>278</sup> The Japanese government was also found guilty of committing rape and sexual slavery against the comfort women.<sup>279</sup> As the tribunal was a peoples' own creation, not that of a national state or international body, its decision cannot be legally enforced. It is therefore, not in a position to impose sentences or order reparations.<sup>280</sup> Although, Phelps refers to this as a 'hollow victory', she goes on to state, however, that the tribunal's decision provided a moral victory for the comfort women.<sup>281</sup> She also points to the fact that the Women's Tribunal was the first war crimes tribunal which focused solely on gender-specific crimes committed during armed conflict situations.<sup>282</sup> Matsui also draws attention to the fact that the Women's Tribunal influenced the re-examination of international law in the area of gender crimes<sup>283</sup>, pointing to the need for the sexual slavery to be recognised as a crime to restore the honour and dignity of the comfort women, as achieved by the tribunal.<sup>284</sup> Other war crimes trials were held in Asia, such as that by the United States military commission. The commission convicted General Tomoyuki Yamashita, who commanded the 14<sup>th</sup> Area Army of Japan, for failing in his command responsibility. He was charged with 'failing to exercise adequate control over his troops, who had committed widespread rape, murder and pillage in Manila.'<sup>285</sup>

### **2.3 THE FOUR GENEVA CONVENTIONS OF 1949 AND 1977 ADDITIONAL PROTOCOLS**

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<sup>276</sup> Matsui 'Overcoming the culture of impunity for wartime sexual violence.' Chinkin 'Women's international tribunal on Japanese military sexual slavery' at 335.

<sup>277</sup> *Ibid.* Women's International War Crimes Tribunal 2000 for the Trial of Japan's Military Sexual Slavery, para 24.

<sup>278</sup> *Ibid.* Lee 'Comforting the comfort women' at 534.

<sup>279</sup> *Ibid.* Argibay, 'Sexual slavery and the "comfort women" of World War II' at 388.

<sup>280</sup> Chinkin 'Women's international tribunal on Japanese military sexual slavery' at 339.

<sup>281</sup> Andrea R Phelps 'Gender-based war crimes: Incidence and effectiveness of international criminal prosecution' (2006) 12 *William & Mary Journal of Women & the Law* 499 at 514.

<sup>282</sup> *Ibid.*

<sup>283</sup> Matsui 'Overcoming the culture of impunity for wartime sexual violence.' Drom 'Assessment of the 2000 Tokyo Women's International War Crimes Tribunal on Japan's Military Sexual Slavery.'

<sup>284</sup> *Ibid.*

<sup>285</sup> Askin 'Prosecuting wartime rape and other gender-related crimes' at 302.

The massive destruction and atrocious acts committed during World War II against civilians, emphasised the necessity to have international instruments to protect them during wars. Instruments such as the Universal Declaration of Human Rights, the Genocide Convention and the Fourth Geneva Convention for the protection of civilians<sup>286</sup> were drafted to deter bloodbaths and brutality of the kind which occurred in World War II.<sup>287</sup> The four Geneva Conventions of 1949 revised the Geneva Conventions<sup>288</sup> which were in existence. These four Geneva Conventions of 1949, together with the 1977 Additional Protocols, constitute the customary rules of international humanitarian law.<sup>289</sup> Common Article 2 sets out the circumstances together with the conditions in which these Conventions apply, thus filling a gap which other instruments of international humanitarian law did not provide.<sup>290</sup> Common article 2 provides in part that:

(1) In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

(2) The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance

Although the Geneva Conventions apply during armed conflict situations, the phrase ‘[i]n addition to the provisions which shall be implemented in peacetime’ in article 2(1) indicates that

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<sup>286</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), (10 December 1948). Article 5, for example, provides that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Convention on the Prevention and Punishment of Genocide, 9 December 1948, 78 UNTS 277 (entered into force January 12, 1951), Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 [hereinafter Fourth Geneva Convention].

<sup>287</sup> Sellers ‘The cultural value of sexual violence’ at 321.

<sup>288</sup> The 1864 Geneva Convention was revised and expanded in 1906 and 1929. These conventions are replaced by the four Geneva Conventions of 1949.

<sup>289</sup> Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 [hereinafter the First Geneva Convention], Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 [hereinafter the Second Geneva Convention], the Third Geneva Convention, and the Fourth Geneva Convention. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 [hereinafter Protocol I], Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 609 [hereinafter Protocol II].

<sup>290</sup> [Geneva Convention - ICRC databases on international humanitarian law](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518), para 192 (stating that [n]either the 1899 and 1907 Hague Conventions nor the 1864, 1906 and 1929 Geneva Conventions specified under what conditions their application would be triggered, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> (accessed 20 June 2018).

human rights norms continue to apply even during armed conflict situations.<sup>291</sup> As a result, the provisions in international human rights treaties, such as, the Convention on the Elimination of All Forms of Discrimination (CEDAW)<sup>292</sup> and the Convention against Torture apply during armed conflicts.<sup>293</sup> Thus, states cannot derogate from their obligations owed to their citizens.

Regarding the protection of women who are wounded, shipwrecked or prisoners of war, the First, Second and Third Geneva Conventions contain provisions which are similar to article 3 of the 1929 Geneva Convention, in that '[w]omen shall be treated with all consideration due to their sex'.<sup>294</sup> Under article 27(2) of the Fourth Convention, which provides for the protection of civilians during war, rape is explicitly prohibited. The article protects female civilians from 'any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.<sup>295</sup> However, female civilians are only protected where 'they find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or occupying powers which they are not nationals'.<sup>296</sup> Thus, article 27(2)'s application is limited, in that female citizens are not protected from the activities of the state to which they belong.<sup>297</sup>

Articles 75 and 76 of Additional Protocol I which relate to international armed conflicts, extend the 'humanitarian protection 'contained in the Fourth Convention to 'civilians. . . in the power of a Party to the conflict.'<sup>298</sup> The articles are also applicable to 'rules of international law relating to the protection of fundamental human rights during international armed conflict'.<sup>299</sup> Article 75(2)(b) of Protocol I does not specifically prohibit rape. It prohibits 'civilians and military agents' from inflicting 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.'<sup>300</sup> The provision offers protection to both males and females, thus taking into consideration men as victims of

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<sup>291</sup> [Geneva Convention - ICRC databases on international humanitarian law](#), para 199. Kelly Dawn Askin 'War crimes against women: Prosecution in International war crimes tribunals' at 245.

<sup>292</sup> See Chapter 1, section 1.2 with regard to CEDAW.

<sup>293</sup> Askin 'War crimes against women' at 245.

<sup>294</sup> First Geneva Convention, art 12, Second Geneva Convention, art 12 and Third Geneva Convention, art 14. Convention relative to the Treatment of Prisoners of War, Geneva (27 July 1929) art 3 ('Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex. Prisoners retain their full civil capacity.') Sellers 'The cultural value of sexual violence' at 321.

<sup>295</sup> Fourth Geneva Convention, art 27. See also Sellers 'The cultural value of sexual violence' at 321.

<sup>296</sup> Fourth Geneva Convention, art 4.

<sup>297</sup> Gardam and Jarvis 'Women, armed conflict and international law' at 64.

<sup>298</sup> Protocol I, art 72.

<sup>299</sup> *Idem*

<sup>300</sup> Protocol I, art 75(2)(b).

sexual violence. Article 75(2)(a) of Protocol I also prohibits '[t]orture of all kinds, whether physical or mental', and mutilation.<sup>301</sup> These are crimes that cover violent sexual acts. Article 76(1) of Additional Protocol I, on the other hand, specifically protects women against rape and other forms of sexual violence committed against women by providing that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'.<sup>302</sup>

With regard to non-international armed conflicts, article 4(2)(e) of Additional Protocol II is worded similarly to article 75(2)(b) of Additional Protocol I, except for the inclusion of the word 'rape'. Article 4(2)(e), which applies to 'persons who do not take a direct part or who have ceased to take part in hostilities',<sup>303</sup> prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.<sup>304</sup> Other provisions in article 4(2) which are relevant to the protection of women and men which would cover sexual violence are articles 4(2)(a) and (f). Article 4(2)(a) prohibits *inter alia* 'cruel treatment such as torture, mutilation or any form of corporal punishment', and article 4(2)(f) prohibits '[s]lavery and the slave trade in all forms'. Through these articles, international humanitarian law recognises the vulnerability of women to sexual violence by expressly including rape, enforced prostitution and also indecent assault. However, these crimes are categorised as crimes against honour or dignity, rather than crimes of violence.<sup>305</sup> In commenting on the implications of linking rape as a crime of honour in article 27, Coomraswamy stated that:

By using the honour paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law. Thus, criminal sexual assault, in both national and international law, is linked to the morality of the victim. When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as 'dirty' or 'spoiled'. Consequently, many women will neither report nor discuss the violence that has been perpetrated against them. The nature of rape and the silence that tends to surround it makes it a particularly difficult human rights violation to investigate.<sup>306</sup>

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<sup>301</sup> Protocol I, art 75(2)(a)(ii) and (iv).

<sup>302</sup> Protocol I, art 76(1).

<sup>303</sup> Protocol II, art 4(1).

<sup>304</sup> Protocol II, art 4(2)(e).

<sup>305</sup> Gardam and Jarvis 'Women, armed conflict and international law' at 102.

<sup>306</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomraswamy, submitted in accordance with commission resolution 1997/44, E/CN.4/1998/54 (26 January 1998)

The Fourth Geneva Convention and the other three Geneva Conventions contain a ‘grave breaches’ provision, identifying certain crimes as the most serious crimes under international humanitarian law.<sup>307</sup> Commission of these crimes attaches to them individual criminal responsibility. As states have an obligation to prosecute violations of grave breaches listed in article 147, the universal jurisdiction principle applies to those grave breaches listed in article 147.<sup>308</sup> Under article 146 of the Fourth Geneva Convention, for example:

High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches. . . Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.

Rape and the other sexual crimes mentioned in article 27(2) are not listed as crimes of ‘grave breaches’ in article 147 of the Fourth Geneva Convention. Neither is rape mentioned in common article 3 of the Geneva Conventions. Also, Protocol I which extends the grave breaches system found in the Geneva Conventions does not expressly refer to sexual violence.<sup>309</sup> Some of the following acts which article 147 lists as grave breaches are ‘willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person’.<sup>310</sup> Torture, inhuman treatment and ‘willfully causing great suffering or serious injury to body or health’ were not originally considered as acts of rape by those who drafted the Geneva Convention.<sup>311</sup> Although sexual violence during armed conflict is often used as a means to torture both women and men, torture was historically considered as a means to obtain a confession or information from the victim, or another person.<sup>312</sup> With the adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/102/91/PDF/G9810291.pdf?OpenElement> (accessed 23 June 2018).

<sup>307</sup> Gardam and Jarvis ‘Women, armed conflict and international law’ at 73.

<sup>308</sup> Patricia Sellers ‘Sexual violence and peremptory norms: The legal value of rape’ (2002) 34 *Cape Western Reserve Journal of International Law* 287 at 298.

<sup>309</sup> Judith Gardam and Michelle Jarvis ‘Women, armed conflict and international law’ at 74. See Additional Protocol I, art 85. No mention is made of grave breaches under Additional Protocol II.

<sup>310</sup> Fourth Geneva Convention, art 147. See First Geneva Convention, art 50, Second Geneva Convention, art 51 and Third Geneva Convention, art 130 for corresponding articles on grave breaches.

<sup>311</sup> Gardam and Jarvis ‘Women, armed conflict and international law’ at 100.

<sup>312</sup> *Idem* at 188. Copelon ‘Surfacing gender’ at 250 referring to the 1958 ICRC Commentary to the Fourth Geneva Convention.

as part of international human rights law, the definition of torture has been given a broader meaning. Torture is defined in article 1 of the Convention as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person is suspected of having committed, or intimidating or coercing him [or her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>313</sup>

The Special Rapporteur to the United Nations has stated that ‘in many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture,’<sup>314</sup> thus accepting that under international law rape can constitute torture. ‘Willfully causing great suffering or serious injury to body or health,’ was included in the grave breaches list, as the crime of torture was considered as having a narrow meaning.<sup>315</sup> Gardam and Jarvis also argue that though the crimes mentioned in article 27(2), are not expressly listed under article 147 as grave breaches, they would come under the umbrella of ‘inhuman treatment’.<sup>316</sup> The International Committee of the Red Cross (ICRC),<sup>317</sup> tribunals and international courts, such as, the ICTY<sup>318</sup> and ICTR,<sup>319</sup> the European Court of Human Rights<sup>320</sup> and the ICC<sup>321</sup> now recognise that rape can constitute torture.

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<sup>313</sup> UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39<sup>th</sup> Sess., (10 December 1984). Copelon ‘Surfacing gender’ at 251.

<sup>314</sup> *Prosecutor v Delialic, Mucic, Delic and Landzo* (judgment) Case No.IT-96-21-T, Nov. 16, 1998, para 493 [hereinafter *Celebici Judgment*] referring to the Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13, 22 June 1998, para. 55.

<sup>315</sup> Copelon ‘Surfacing gender’ at 250.

<sup>316</sup> Gardam and Jarvis ‘Women, armed conflict and international law’ at 201.

<sup>317</sup> The ICRC stated that rape is covered under the grave breach of ‘willfully causing great suffering or serious injury to body or health.’ In 1993 the United States Department of State recognised rape as a war crime or a grave breach under customary international law and the Geneva Conventions. It stated that rape could be prosecuted as such. See Theodor Meron ‘Rape as a crime under international humanitarian law’ (1993) 87 *American Journal of International Law* 424 at 426 -427.

<sup>318</sup> *Celebici Judgment*, para 494-497. Under article 5(f) of the ICTY Statute torture is listed as an act constituting a crime against humanity. In the *Celebici Judgment*, the Trial Chamber held that the following elements of torture must be met for the purposes of applying articles 2 and 3 of the ICTY Statute:

- (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
- (ii) which is inflicted intentionally,
- (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
- (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.



Rape has also been recognised as a crime under common article 3 of the Geneva Conventions, as held in the *Prosecutor v Kunarac et al* case.<sup>322</sup> The three defendants in this case were convicted of torture, outrages upon personal dignity and rape of Bosnian Muslim women during the armed conflict in and around Foca, a city in former Yugoslavia. With regard to the crime of rape, the defendants were convicted under articles 3 and 5 of the ICTY Statute and under common article 3.<sup>323</sup> The Trial Chamber in this case made reference to the fact that common article 3 is part of customary international law, a requirement for the application of the article.<sup>324</sup> It also referred to the Appeals Chamber decision in the *Prosecutor v Tadi* case where it was held that ‘customary international law imposes criminal liability for serious violations of common Article 3 . . .’<sup>325</sup> The Trial Chamber held that ‘rape, torture and outrages upon personal dignity, no doubt [constitute] serious violations of common article 3, entail criminal responsibility under customary international law’.<sup>326</sup>

## 2.4 THE INTERNATIONAL CRIMINAL TRIBUNALS FOR FORMER YUGOSLAVIA AND RWANDA

Following the atrocities which occurred in former Yugoslavia<sup>327</sup> and Rwanda,<sup>328</sup> the 1990s saw a change in the recognition and prosecution of SGBCs in international law as war crimes,

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<sup>319</sup> *Prosecutor v Akayesu* (trial judgment) Case No ICTR 96-4- T, Sept.2, 1998, paras 597 and 687. Under article 3(f) of the ICTR Statute torture is listed as an act constituting a crime against humanity.

<sup>320</sup> See *Aydin v Turkey*, Judgment of 25 September 1997, ECHR (where the rape of applicant during her detention was held to constitute torture). With regard to the ICTY, ICTR and ICC, this will be discussed under the relevant sections.

<sup>321</sup> Under article 7(f) of the ICC Statute torture is listed as an act constituting a crime against humanity.

<sup>322</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, (trial judgment), Case No.IT-96-23-T and IT-96-23/1-T, 22 February, 2001.

<sup>323</sup> *Prosecutor v Kunarac, Kovac and Vukovic*, (trial judgment), paras 401 -409 and paras 883 – 890.

<sup>324</sup> *Idem* para 408,

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

<sup>327</sup> The Yugoslav wars started in 1991 and ended in 2001. Niarchos ‘Women, war and rape’ at 655 states that most documented cases of rape ‘occurred between the fall of 1991 and the end of 1993, with a concentration of cases between April and November 1992.’ For a historical review of the war in former Yugoslavia see Pratt and Fletcher ‘Time for Justice The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia,’ (2004) 9 *Berkely Journal of Gender, Law and Justice* at 82-87. Alexandra Stiglmayer ‘The rapes in Bosnia-Herzegovina’ in Alexandra Stiglmayer (ed) *Mass Rape, the War against Women in Bosnia-Herzegovina* (1994) at 82-169 (giving a detailed account of the rapes which occurred in Bosnia-Herzegovina.) and at 1-34 (giving a historical account of the war in former Yugoslavia and the historical response of the international community to the war.)

<sup>328</sup> The genocide in Rwanda was from April 1994 to July 1994. For an account of the genocide in Rwanda see Binaifer Nowrojee, Dorothy Quincy Thomas, and Janet Fleischman, *Shattered Lives, Sexual Violence during the*

genocide, and crimes against humanity.<sup>329</sup> During the ethnic cleansing which occurred in former Yugoslavia, Bosnian and Muslim women were raped by Serbian soldiers.<sup>330</sup> Copelon, in drawing attention to the mass rapes directed against these women to accomplish the genocidal campaign of ethnic cleansing, states that they were examples of how rape of women throughout history was perceived as a non-issue or lesser crime.<sup>331</sup> She adds that these rape cases were brought to the international community's attention because of the ethnic cleansing or genocide which occurred.<sup>332</sup> In Pratt and Fletcher's view, the historical pattern of poor recognition of violence against women in former Yugoslavia did not persist because of the press coverage given to the mass rape cases which occurred in former Yugoslavia, the intervention of NGOs and women's organisations, and also United Nations' reports and resolutions recognising the seriousness of the occurrence of mass rapes.<sup>333</sup> Copelon, also cites the invisibility of rape during the 1994 genocide in Rwanda, where the mass rapes committed there were not reported for nine months after genocide was made public and a Belgian doctor made known to the media that there were a large number of women who were bearing children as a result of having being raped.<sup>334</sup>

Due to the extensive international media coverage<sup>335</sup> of the ethnic cleansing and other atrocious crimes which occurred in former Yugoslavia, particularly in Bosnia-Herzegovina, as well as the intervention of NGOs and women's organisations in investigating these crimes, the Security Council was persuaded to act. Adopting the Secretary-General's report, which had the

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*Rwandan Genocide and its Aftermath*, Human Rights Watch/Africa. Human Rights Watch Women's Rights Project, Federation Internationale des Ligues des Droits de L'Homme, (New York: Human Rights Watch, 1996)

<sup>329</sup> Askin 'A decade of the development of gender crimes' at 16. Susan M Pritchett 'Entrenched hegemony, efficient procedure or selective justice? An inquiry into charges for gender-based violence at the International Criminal Court' (2008) 17 *Transnational Law and Contemporary Problems* 265 at 274. Kimberly E Carson 'Reconsidering the theoretical accuracy and prosecutorial effectiveness of International Tribunals' ad hoc approaches to conceptualizing crimes of sexual violence as war crimes, crimes against humanity and acts of genocide' (2011-2012) 39 *Fordham Urban Law Journal* 1249 at 1252.

<sup>330</sup> Though Muslim Croatian and Serbian women were raped by Bosnian Muslim and Croatian forces, the majority of Muslim women who were from Bosnia-Herzegovina were raped by Serbian soldiers. Niarchos 'Women, war and rape' at 655. Pratt and Fletcher 'Time for justice' at 86.

<sup>331</sup> Copelon 'Surfacing gender' at 244-245.

<sup>332</sup> *Idem* at 245-246.

<sup>333</sup> Pratt and Fletcher 'Time for justice' at 81-82.

<sup>334</sup> Copelon 'Surfacing gender' at 245. Copelon 'Gender crimes as war crimes' at 224.

<sup>335</sup> The conflict in former Yugoslavia was covered by a large number of women reporters. Gardam is of the opinion that this was not coincidental, thus suggesting that without them, the atrocities, which included rape and other gender based crimes, would have gone unreported. Judith Gardam 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *The International and Comparative Law Quarterly* 55 at 58

draft statute annexed to it, the Security Council established the ICTY<sup>336</sup> in May 1993 ‘for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’.<sup>337</sup> In establishing this tribunal, the Security Council acted under Chapter VII of the United Nations Charter<sup>338</sup> by concluding that the crimes being committed in former Yugoslavia constituted a threat to international peace and security.<sup>339</sup> The ICTY,<sup>340</sup> based in The Hague, Netherlands, is the first *ad hoc* international criminal tribunal which the United Nations Security Council (UNSC) established. In emphasising this point, Theodor Meron, refers to the tribunal as the first truly international criminal tribunal established by the Security Council, as the Nuremberg and Tokyo tribunals were considered by some commentators as victors’ courts.<sup>341</sup>

The provisions of the tribunal’s statute were considered by scholars as advancing international criminal and humanitarian laws,<sup>342</sup> although it was only applicable to former Yugoslavia. Despite this being proved to be true, Mitchell observes that the ICTY’s statute (and that of the International Criminal Tribunal for Rwanda) did not actually develop the law any further, as the provisions were drafted cautiously to avoid those issues which might offend the principle of

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<sup>336</sup> The decision to establish a tribunal was made by the Security Council, by Res 808 (1993) of 22 February 1993. The Security Council then requested the Secretary-General of the United Nations to prepare a report within 60 days, which he did, with a draft statute annexed to his report. The Security Council adopted the statute (without any changes) on 25 May 1993 thus establishing the Tribunal by SC res 827. SC res 827, 48<sup>th</sup> Sess., U.N. SCOR, 3217<sup>th</sup> mtg, U.N. Doc. S/RES/827 (1993).

<sup>337</sup> *Idem* at paras 1 and 3.

<sup>338</sup> The Security Council has the responsibility of maintaining international peace and security. To carry out this responsibility, Chapter VII of the United Nations Charter lists the action which the Security Council can take with respect to threats to the peace, breaches of the peace, and acts of aggression. See generally United Nations, Charter of the United Nations, 24 October 1945, arts 39 -51, I UNTS XVI.

<sup>339</sup> UN Security Council Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Res. 808 (1993).

<sup>340</sup> The full title of the Tribunal is ‘The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.’

<sup>341</sup> Theodor Meron ‘The Normative Impact on International Law of the International Tribunal for Former Yugoslavia’ in *War Crimes Law Comes of Age* (1998) *The American Journal of International Law* at 210. Meron, argues that the failure of the international community in putting an end to the bloodshed and atrocities which were being committed in former Yugoslavia, led to the creation of the ICTY as the preferred means of prosecuting perpetrators of the crimes. This suggests that tribunals such as the Nuremberg and Tokyo Tribunal were not considered appropriate in promoting justice and international law. Other scholars, such as Roy S. Lee is also of the opinion that the ICTY, is the first true international criminal tribunal for prosecuting criminals. Roy S Lee ‘The Rwandan Tribunal’ (1996) 9 *Leiden Journal of International Law* 37 at 37.

<sup>342</sup> *Idem* at 214. Meron, however, points out that the ICTY drafters failed to take the opportunity to advance certain areas of international law, such as the defence of superior orders. Pratt and Fletcher had predicted in an early article that the ICTY’s statute and its judgments would become authoritative statements where international legal principles are concerned. Pratt and Fletcher ‘Time for justice’ at 77.

*nullum crimen sine lege*.<sup>343</sup> Niarchos was not as subtle as Mitchell in her comments about the drafting of the ICTY's statute. Although she is also of the opinion that the statute was drafted cautiously, she also believes that a conservative approach was used in its drafting 'to avoid the criticism directed at the Nuremberg proceedings of infidelity to the *nullum crimen sine lege* principle.'<sup>344</sup>

Just as in the case of the establishment of the ICTY, the UNSC exercised its powers under Chapter VII of the United Nations Charter to establish the ICTR on 8 November, 1994.<sup>345</sup> This was as a result of the atrocities that occurred during Rwanda's internal armed conflicts.<sup>346</sup> The ICTR was established nearly a year after the creation of ICTY, at the request of the Rwandan government to prosecute 'persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring

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<sup>343</sup> David S Mitchell 'The prohibition of rape in International Humanitarian Law as a norm of Jus Cogens: Clarifying the doctrine' (2005) 15 *Duke Journal of Comparative & International Law* 219 at 240. UN Security Council Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Res. 808 (1993), paras 34 and 35. In his report the Secretary-General stated that the *nullum crimen sine lege* principle would be applied so as to avoid the problem of some states not being able to adhere to specific conventions. The *nullum crimen sine lege* principle provides (as in this case) that the ICTY is expected to apply the rules of international humanitarian law which are part of customary law. This would avoid the problem of whether a state should adhere to a particular convention, as the application of such international humanitarian law would already be part of customary law. The Secretary-General identified four conventions as sources of customary law. They are the Geneva Conventions of 12 August 1949 for the Protection of War Victims, the Hague Convention (iv) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and The Charter of the IMT of 8 August 1945.

<sup>344</sup> Niarchos 'Women, war and rape' at 663.

<sup>345</sup> The full title of the Tribunal is 'The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994.' The tribunal was established by Resolution 955 which had the Statute of the Tribunal annexed to it. See United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda (with Annexed Statute) S.C. res 955, U. N. SCOR, 49<sup>th</sup> Sess, 3453<sup>rd</sup> mtg., Annex, U.N. Doc S/RES/955 (Nov. 8, 1994)

<sup>346</sup> Whilst the armed conflict in Rwanda was internal and no longer in existence by the time the ICTR was established, the conflict in former Yugoslavia was of an international nature with intra-state elements. It was created whilst the armed conflict in former Yugoslavia was still going on. This is because of the attention given by the media, various NGO's and feminist academics, which persuaded the United Nations to act quickly. The same international response was not given to the Rwandan conflict. The international community only responded after the conflict in Rwanda had ended. United Nations Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda available at [www.cfr.org/rwanda/.../report-independent-inquiry-into-actions...rwanda/...](http://www.cfr.org/rwanda/.../report-independent-inquiry-into-actions...rwanda/...) (accessed on 14 January 2015). (Where the Independent Inquiry which was set up to report on the actions taken by the United Nations during the 1994 genocide in Rwanda, stated that the United Nations' failure to prevent and stop the genocide was a 'failure by the United Nations system as a whole.' It also stated that there was 'a persistent lack of political will by member states to act, or to act with enough assertiveness.' Copelon 'Gender crimes as war crimes' at 225 (commenting on the fact that the media and other international observers did not report the atrocious crimes which were being committed on women during the genocide in Rwanda).

states, between 1 January 1994 and 31 December 1994 . . .<sup>347</sup> Thus, the ICTR's jurisdiction was limited to a specific region and conflict. It was agreed at a later date that the tribunal's seat would be at Arusha, Tanzania, following appropriate arrangements between the United Nations and the Government of Tanzania.<sup>348</sup>

#### **2.4.1 The Jurisdiction of the Statute for the International Criminal Tribunals for former Yugoslavia and Rwanda.**

Although the ICTY's subject-matter jurisdiction explicitly listed rape as a crime against humanity in article 5 of the statute,<sup>349</sup> it did not specifically mention rape or other sexual crimes under its other jurisdictional provisions to try individuals<sup>350</sup> for grave breaches of the Geneva Conventions of 1949,<sup>351</sup> violations of the laws and customs of war<sup>352</sup> as well as genocide.<sup>353</sup>

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<sup>347</sup> See United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda, para 1. See also Statute of the International Tribunal for Rwanda, art. 1, SC res 995, U.N. SCOR, 49<sup>th</sup> Sess., 3453 mtg., U.N. Doc S/RES/955 (1994); 33 ILM 1598 (1994). The Statute was last amended by SC Res. 1878 (2009) of 7 July 2009.

<sup>348</sup> *Idem* para 6.

<sup>349</sup> Statute of the International Tribunal for the former Yugoslavia, art.5(g), SC res 827, U.N. SCOR, 48<sup>th</sup> Sess., 3217<sup>th</sup>mtg., at 1-2 (1993), 32 ILM 1159 (1993). The Statute was last amended on 7 July 2009 by Resolution 1877.

<sup>350</sup> The ICTY provides that the Tribunal shall have jurisdiction over natural persons. Thus, it does not have jurisdiction over companies as the Nuremberg Tribunal did. ICTY Statute, art 6.

<sup>351</sup> ICTY Statute, art 2 titled 'Grave breaches of the Geneva Conventions of 1949' provides:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of a fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

The Four Geneva Conventions, contain a provision which lists the violations that qualify as grave breaches, see section 2.3 above. The lists of these violations as contained in the Geneva Conventions are reproduced in article 3. See First Geneva Convention, art. 50, Second Geneva Convention, art. 51, Third Geneva Convention, art 130, Fourth Geneva Convention, art 147.

<sup>352</sup> ICTY Statute, art 3 is titled 'Violations of the laws or customs of war.' This article provides:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Scholars debated whether the non-inclusion of rape and other SGBCs in those articles would prevent such crimes from being prosecuted under them. However, the Trial Chamber in the *Prosecutor v Furundzija* case has held that ‘rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war or an act of genocide, if the requisite elements are met, and may be prosecuted accordingly.’<sup>354</sup> Including rape as a crime against humanity in CCL10<sup>355</sup> and in the ICTY’s statutes under article 5 (and under article 3 of the ICTR Statute), attests to the fact that rape is now considered a crime against humanity in international law. As a result of such classification, Mitchell points out that rape under the ICTY statute as a crime against humanity can be prosecuted when committed as part of a widespread and systematic attack. Mitchell adds that rape could also be prosecuted as a crime against humanity under the umbrella of enslavement, torture, persecution on political, racial or religious grounds or inhumane acts.<sup>356</sup> Niarchos puts the omission of rape from articles 2<sup>357</sup> and 3<sup>358</sup> down to the cautionary approach taken by the drafters of the statute.<sup>359</sup> In line with other scholars such

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The lists of crimes under this article were drawn from the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and also its annexed regulations. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907. Hague Convention (IV) Respecting the Laws and Customs of War on Land Annex (Regulations), Oct. 18, 1907 (citing Amy E Ray ‘The Shame of it: Gender-based terrorism in the former Yugoslavia and the failure of International Human Rights Law to comprehend the injuries’ (1997) 46 *The American University Law Review* 793 at 820).

<sup>353</sup> ICTY Statute, art 4 is titled ‘Genocide.’ It reads in part:

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
  - (a) killing members of the group;
  - (b) causing serious bodily or mental harm to members of the group;
  - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) imposing measures intended to prevent births within the group;
  - (e) forcibly transferring children of the group to another group.

The provisions in this article were reproduced from the Genocide Convention 1948

<sup>354</sup> *Prosecutor v Furundzija*, (Trial Judgment) para 172.

<sup>355</sup> Control Council Law No. 10.

<sup>356</sup> Mitchell also uses the same argument for the prosecution of rape under the ICTR Statute. Mitchell ‘The prohibition of rape’ at 241. These crimes are listed under article 5 of the ICTY statute as crimes against humanity. Enslavement comes under article 5(c), torture under article 5(f), persecutions on political, racial or religious grounds under article 5(h) and inhumane acts under article 5(i). Article 5 of the ICTY Statute.

<sup>357</sup> ICTY Statute, art 2.

<sup>358</sup> ICTY Statute, art 3.

<sup>359</sup> Niarchos ‘Women, war and rape’ at 683. In referring to the exclusion of rape under article 2 as a war crime, Copelon ‘Gender crimes as war crimes’ at 229 (noting that though this exclusion was initially considered to be disappointing, it worked in the prosecutors’ favour because it was easier for prosecutors to argue that the crimes of sexual violence should be mainstreamed, otherwise such crimes would have been excluded altogether).

as Ray,<sup>360</sup> she believes that rape could be prosecuted as a grave breach under article 2<sup>361</sup> and as a war crime under article 3 if the tribunal so wishes.<sup>362</sup> She was, however, of the opinion that prosecutors would have had in mind prosecuting rape as genocide under article 4, and a crime against humanity under article 5 of the ICTY statute.<sup>363</sup> Askin's view was that rape and other SGBCs can be prosecuted under article 3 as war crimes, and under article 4 as genocide although they are not explicitly mentioned in these articles. In her opinion, failing to prosecute these crimes under these articles was a result of historical marginalisation and lack of political will.<sup>364</sup> Sellers, in commenting on the explicit mention of rape in only one article of the statute, aptly notes that this is due to the historical neglect of rape and other sexual violent crimes as separate prosecutable categories, stating that '[t]he conventional wisdom was that only rape as a crime against humanity could be prosecuted'.<sup>365</sup>

Although Ray reaches the same conclusion as other scholars that rape can be prosecuted under other articles of the statute,<sup>366</sup> she takes the argument a step further. First, she points to the fact that the statute explicitly excludes SGBCs such as forced prostitution, pregnancy and maternity from the jurisdiction of the tribunal. Secondly that these crimes which were inflicted on the women were gender-specific crimes as they were inflicted on them because they were women and as such, each article should explicitly include gender-specific crimes. Thirdly, although crimes such as rape appear to be the same between men and women, they do not have the same consequences as the groups are distinguishable. She, thus, reached the conclusion that the fact that gender-based crimes were excluded from the statute, despite their existence, depicted the inadequacy of international human rights law in<sup>367</sup> understanding and addressing such crimes.<sup>368</sup> The ICTY confirmed that though rape is not explicitly mentioned in articles 2, 3

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<sup>360</sup> Ray 'The shame of it' at 817-819.

<sup>361</sup> This would come under sub-article (b) as torture or inhuman treatment and sub-article (c) as wilfully causing great suffering or serious injury to body or health.

<sup>362</sup> Niarchos 'Women, war and rape' at 683.

<sup>363</sup> *Idem* at 684. The definition of genocide is taken verbatim from the Convention on the Prevention and Punishment of the Crime of Genocide. As a crime under genocide it would thus be possible to prosecute rape under sub-articles (a) to (d). See Ray 'The shame of it' at 821.

<sup>364</sup> Askin 'A decade of the development of gender crimes' at 16.

<sup>365</sup> Patricia V Sellers 'Gender strategy is not a luxury for international courts' (2008) 17 *American University Journal of Gender, Social Policy & the Law* 301 at 307.

<sup>366</sup> Ray 'The shame of it' at 825.

<sup>367</sup> Although Ray concentrates on the international human rights law aspect of gender-specific crimes in former Yugoslavia, the same arguments can be put forward when considered from the international humanitarian law and international criminal law aspect.

<sup>368</sup> Ray 'The shame of it' at 817-828.

and 4 of its statute, it may be prosecuted under them as long as it meets the required elements.<sup>369</sup> With regard to article 3, the ICTY states that the article establishes an ‘umbrella rule’; serious violations under international humanitarian law not mentioned in article 3 are thereby covered.<sup>370</sup> In interpreting article 3 the Appeals Chamber in *Prosecutor v Tadi* held that this article also encompasses other violations of international humanitarian law by stating that:

[I]t can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 [of the Statute of the Tribunal], more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as “grave breaches” by those Conventions; (iii) violations of common Article 3 [of the Geneva Conventions] and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, *i.e.* agreements which have not turned into customary international law . . .<sup>371</sup>

Thus, although rape is not explicitly mentioned in article 3, it can be prosecuted under this article. Also the crime of outrages upon personal dignity which includes rape would come under article 3,<sup>372</sup> as article 3 ‘functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal’.<sup>373</sup>

The ICTR has jurisdiction to try an accused person<sup>374</sup> for genocide,<sup>375</sup> war crimes,<sup>376</sup> and crimes against humanity.<sup>377</sup> The subject matter of its jurisdiction explicitly lists rape as a crime

<sup>369</sup> See *Prosecutor v Furundzija*, (Trial Judgment) Case No.IT-95-17/1/T, Dec. 10, 1998, para 172

<sup>370</sup> *Idem* para 133.

<sup>371</sup> *Prosecutor v Tadi*, Case IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 Oct 1995, para 89. See also *Prosecutor v Kunarac, Kovac and Vukovic*, (Trial Judgment), para 401 referring to the Appeals Chamber decision in the *Prosecutor v Tadi* case.

<sup>372</sup> *Prosecutor v Furundzija*, (Trial Judgment) para 173 (referring to the ICTY’s ‘Decision on the defendant’s motion to discuss Counts 13 and 14 of the indictment (Lack of subject-matter jurisdiction),’ 29 May 1998, where the Trial Chamber held that article 3 of the statute covered outrages upon personal dignity which included rape.)

<sup>373</sup> *Prosecutor v Kunarac, Kovac and Vukovic*, (Trial Judgment), para 401.

<sup>374</sup> The ICTR’s Statute gives the tribunal jurisdiction over natural persons. It does not have jurisdiction over companies as the Nuremberg Tribunal did. ICTR Statute, art 5.

<sup>375</sup> ICTR Statute, art 2. The ICTR’s has jurisdiction to try genocide; its provisions are similar to that of the ICTY’s Statute, which are taken verbatim from the definition of genocide in articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>376</sup> ICTR Statute, art 4. The crimes listed under this article come under the war crimes provisions as ‘serious violations of Article 3 common to the Geneva Convention of 12 August 1949 for the Protection of War Crimes and of Additional Protocol II thereto of 8 June 1977.’ Schaack draws ones attention to the fact that this article was taken from parts of Common Article 3 of the Geneva Convention and Protocol II. Schaak ‘Obstacles on the road to gender justice’ at 377.

<sup>377</sup> ICTR Statute, art 3.



against humanity.<sup>378</sup> Meanwhile, the tribunal can prosecute individuals for rape, as well as other crimes listed in the article as crimes against humanity when such crimes are ‘committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds’.<sup>379</sup> This provision differs from that of the ICTY Statute relating to crimes against humanity, where the ICTY has power to try one of such crimes ‘when committed in armed conflict, whether international or internal in character and directed against any civilian population’.<sup>380</sup> As Askin points out the difference in the crimes against humanity provisions between the ICTR statute and that of the ICTY (and also their war crimes provisions) brings to light the difference in the types of armed conflicts committed in Rwanda and former Yugoslavia. Also, it brings out the different principal crimes committed in the two territories and the Security Council’s specific concerns in creating these tribunals.<sup>381</sup> Other gender-based crimes that can be prosecuted under the ICTR’s Statute as crimes against humanity would include ‘enslavement, torture, persecution on political, racial and religious grounds and other inhumane acts.’<sup>382</sup> As in the case of the ICTY, Askin was of the view that rape and other SGBCs can be prosecuted as genocide, war crimes or under other crimes listed as crimes against humanity.<sup>383</sup> Schaak notes that persecution and other inhumane acts could be charged in situations where acts of gender violence, such as assault and forced nudity, fall short of the crime of rape.<sup>384</sup> She, nonetheless, warns of the danger of bringing many charges of similar crimes which fall short of the crime of rape.<sup>385</sup> She observes that by doing so, the gendered nature of these crimes could become insignificant or less obvious.<sup>386</sup> The language of the war crimes provision in article 4 of the ICTR Statute is adopted from article 3 common to the Geneva Conventions and additional Protocol II.<sup>387</sup> Rape and other gender-based crimes such as those classified as humiliating and

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<sup>378</sup> ICTY Statute, art 3(g).

<sup>379</sup> ICTR Statute, art 3. Though the ICTR is an international institution, the jurisdiction conferred on it is much narrower than that of the ICTY, in that it does not have jurisdiction to prosecute grave breaches, which are crimes under an international armed conflict. Patricia H. Davis ‘The Politics of Prosecuting Rape as a War Crime’ (2000) 34 *The International Lawyer* 1223 at 1242.

<sup>380</sup> ICTY Statute, art 5.

<sup>381</sup> Askin ‘Prosecuting wartime rape and other gender-related’ at 306.

<sup>382</sup> ICTR Statute, arts 3(e), 3(f), 3(h) and 3(i). Schaak ‘Obstacles on the road to gender justice’ at 379.

<sup>383</sup> Askin ‘A decade of the development of gender crimes’ at 16.

<sup>384</sup> Schaak ‘Obstacles on the road to gender justice’ at 380.

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid.*

<sup>387</sup> See article 4(2) of additional Protocol II.

degrading treatment, enforced prostitution and indecent assault of any kind, were also specifically mentioned as war crimes which were outrages upon personal dignity.<sup>388</sup>

#### **2.4.2 The application of Sexual and Gender-based Crimes before the International Criminal Tribunals for former Yugoslavia and Rwanda**

Despite the shortfalls in the drafting of rape and other SGBCs in the ICTY and ICTR statutes, many scholars express a positive view on their contribution to international humanitarian law and also in the area of non-international armed conflicts.<sup>389</sup> For scholars such as Pritchett, the inclusion of rape as a crime in its own right within the ICTY Statute and its codification was ‘revolutionary’, since this was the first time that an international court had done so.<sup>390</sup> Case-law from both tribunals have given recognition to and adjudged gender-based violence crimes as war crimes, crimes against humanity and genocide, in international criminal law,<sup>391</sup> thus breaking the resistance of the international community from prosecuting such crimes.<sup>392</sup> This, however, did not come about without overcoming gender bias which existed in the Office of the Prosecutor.<sup>393</sup> Cases such as *Prosecutor v Akayesu*,<sup>394</sup> where the indictment was amended to include crimes of

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<sup>388</sup> ICTR Statute, art 4(e). Schaack points out that other generic crimes under article 4(a) of the ICTR Statute could be encompassed as gender-based crimes. Schaak ‘Obstacles on the road to gender justice’ at 377. ICTR Statute, art 4(a) reads as follows: ‘Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.’

<sup>389</sup> Copelon ‘Surfacing gender’ at 264 (this also buttresses Copelon’s argument that recognising rape as a war crime is crucial in the understanding of it as a violent crime). In Meron’s opinion, the ICTR Statute has developed international humanitarian law in recognising the criminal character of internal atrocities committed in Rwanda. It is based on the fact that the armed conflict in Rwanda was a non-international one whilst that of former Yugoslavia was international. Theodor Meron ‘The international criminalisation of internal atrocities’ (1995) 89 *American Journal of International Law* 554 at 555. Regarding the ICTR, Lee’s view is that it was an important step forward in the enforcement of international law and the punishment of genocide, war crimes and crimes against humanity. Lee ‘The Rwandan Tribunal’ at 60.

<sup>390</sup> Pritchett ‘Entrenched hegemony, efficient procedure or selective justice?’ at 275.

<sup>391</sup> Luping ‘Investigation and prosecution of sexual and gender-based crimes’ at 446. Carson ‘Reconsidering the theoretical accuracy’ at 1264 and 1268.

<sup>392</sup> Alex Obote-Odora ‘Rape and Sexual Violence in International Law: International Criminal Tribunal for Rwanda’ (2005) 12 *New England Journal of International and Comparative Law* 135 at 137. Wood ‘A Woman Scorned for the “Least Condemned”’ at 293 (commenting on the influence which the ICTR’s decisions have had on various bodies. For example ICTR’s decisions have been cited by the International Court of Justice and the European Court of Human Rights in their proceedings.)

<sup>393</sup> Luping ‘Investigation and prosecution of sexual and gender-based crimes’ at 445 (quoting Richard Goldstone, the former Chief Prosecutor of the ICTY and ICTR, where he stated that ‘in the early years of both tribunals he believed there was ‘gender bias’ within his office’. Examples of such gender bias given were a lack of senior female investigators and the lack of concern among his investigators relating to gender crimes.) Richard Goldstone ‘Prosecuting rape as a war crime’ (2002) 34 *Case Western Reserve Journal of International Law* 277, 280-282.

<sup>394</sup> *Prosecutor v Akayesu* (Trial Judgment).

sexual violence following evidence at trial by a witness of SGBCs,<sup>395</sup> and *Prosecutor v Dragan Nikolic*<sup>396</sup> where the prosecutor was invited by the ICTY Chamber to amend the indictment to include gender crimes, are examples of how the prosecutor overlooked prosecuting SGBCs. *Akayesu*<sup>397</sup> was the first case tried by the ICTR to make a historical breakthrough in the prosecution of SGBCs. Akayesu, was the *bourgmestre* of the Taba commune in Rwanda and ‘was responsible for maintaining law and public order in his commune’, which he failed to do as civilians, mainly Tutsi’s who sought refuge at the *bureau communal* were murdered.<sup>398</sup> Females were also subjected to sexual violence.<sup>399</sup> He was accused of abusing his position of authority by allowing the police, and those under his authority, to rape and torture those women who sought refuge in his commune, by turning a blind eye to their acts as evidenced from his words spoken.<sup>400</sup> The three additional SGBC-related counts he was charged with were:

**Count 13:** Crimes Against Humanity (rape), punishable by article 3(g) of the Statute of the Tribunal;

**Count 14:** Crimes Against Humanity, (other inhumane acts), punishable by Article 3(i) of the Statute of the Tribunal;

**Count 15:** Violations of Article 3 Common to the Geneva Conventions and of article 4(2)(e) of Additional Protocol 2, as incorporated by article 4(e)(outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault) of the Statute of the Tribunal.<sup>401</sup>

Akayesu was convicted of genocide, direct and public incitement to commit genocide, three counts of murder as crimes against humanity, the crimes against humanity of extermination, torture, rape and other inhumane acts.<sup>402</sup> *Akayesu* has been considered the most important case of

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<sup>395</sup> Failure of proper investigation of gender-based war crimes and their recognition was one of the problems which the Trial Chamber’s faced. In *Akayesu*, for example, the initial indictment did not contain charges for such crimes. The trial was adjourned as a result of the testimony of two witnesses giving evidence of rape during the course of the trial. Based on further investigations of the allegations of rape, the indictment was amended during the trial in June 1997, to include sexual violence charges. *Prosecutor v Akayesu* (Trial Judgment) para 6. Askin ‘Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals’ at 105-106. Phelps ‘Gender-based War Crimes’ at 510-511. Schaak ‘Obstacles on the road to gender justice’ at 375 and 381-382. Even in cases when sexual violence was pleaded, there were occasions when these counts were weak or not pleaded properly, which resulted in the charges being dismissed. Schaak cites the case of *Prosecutor v Semanza* as an example where this occurred.

<sup>396</sup> *Prosecutor v Dragan Nikolic* ‘Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence’ Case No. IT-94-2-R61, Oct 29, 1995, paras 32-34. Luping ‘Investigation and prosecution of sexual and gender-based crimes’ at 446.

<sup>397</sup> *Prosecutor v Akayesu* (Trial Judgment).

<sup>398</sup> *Idem* at 1.2, the Indictment.

<sup>399</sup> *Prosecutor v Akayesu* (Trial Judgment).

<sup>400</sup> *Idem*, para 693

<sup>401</sup> *Idem*.

<sup>402</sup> See the verdict in *Prosecutor v Akayesu* (Trial Judgment) Case No ICTR 96-4- T, Sept.2, 1998. Count 1 attracted life imprisonment for the crime of genocide; Count 3, life imprisonment for the crime against humanity,

rape being prosecuted as a crime under international law.<sup>403</sup> The Trial Chamber not only gave the first definition of the legal elements of rape as a crime against humanity and sexual violence under international law,<sup>404</sup> but also recognised that rape was a form of torture when it stated that:

[L]ike torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>405</sup>

The Trial Chamber recognised that ‘rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts’.<sup>406</sup> Rape was defined by the Chamber ‘as a physical invasion of a sexual nature, committed on a person under circumstances that are coercive’.<sup>407</sup> In the case of sexual violence, the ICTR states that sexual violence ‘include[d] rape as any act of a sexual nature which is committed on a person under circumstances which are coercive’.<sup>408</sup> The ICTR states that sexual violence was ‘not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact’.<sup>409</sup> Forced nudity is an example of such an act.<sup>410</sup> Apart from finding the definition of rape to be broad, Askin refers to it as being sensible.<sup>411</sup> Askin, agrees that the definition given by the tribunal is broad as it does away with the mechanical description of rape and also the requirement of the penis penetrating the

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extermination; Count 4, life imprisonment for direct and public incitement to commit genocide; Counts 5, 7, and 9, 15 years imprisonment for each count for crimes against humanity for murder; count 11, 10 years imprisonment for crimes against humanity, torture; Count 13, 15 years imprisonment for the crime against humanity for rape; and Count 14, 10 years imprisonment for the crime of other inhumane acts. These sentences were to be served concurrently; Akayesu was thus sentenced to an effective single sentence of life imprisonment.

<sup>403</sup> Mark Ellis ‘Breaking the silence of rape as an international crime’ (2006-2007) 38 *Case Western Reserve Journal of International Law* 225 at 232.

<sup>404</sup> Obote-Odora ‘Rape and sexual violence in international law’ at 147. Carson ‘Reconsidering the theoretical accuracy’ at 1264. This was the first case in international law to define rape; before that there was no accepted definition of rape in international law. *Prosecutor v Akayesu* (Trial Judgment) paras 596-597. On appeal, the elements of rape were not challenged. The *Prosecutor v Tadic* should have been the first international war crimes trial of rape on its own as a separated war crime, and not jointly with other crimes. However, the charge of rape was withdrawn as the witness was scared to testify.

<sup>405</sup> *Prosecutor v Akayesu* (Trial Judgment) para 597 and 687.

<sup>406</sup> *Idem* paras 597 and 687. See also *Prosecutor v Furundzija*, (Trial Judgment) para 176 referring to the Trial Chamber’s formulation of rape in international law in the *Akayesu* case.

<sup>407</sup> *Idem* paras 598 and 688.

<sup>408</sup> *Ibid.*

<sup>409</sup> *Idem* para 688

<sup>410</sup> Sita Balthazar ‘Gender Crimes and the International Criminal Tribunals’ (2006) 10 *Gonzaga Journal of International Law* 43 at 45.

<sup>411</sup> Askin ‘Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals’ at 109.

vagina.<sup>412</sup> Obote-Odora states that this broad definition considers that victims embroiled in armed conflict do suffer violence. He also notes that this definition is broader than the common law's when defining force or coercion.<sup>413</sup> The *Akayesu* definition of rape which has been referred to as conceptual<sup>414</sup> was later adopted in cases such as *Prosecutor v Delialic et al*<sup>415</sup> and *Prosecutor v Alfred Musema*.<sup>416</sup> Askin and other scholars have described the Trial Chamber's decision as historic because it also confirms the complexity involved in linking sexual violence to the genocide which occurred in Rwanda.<sup>417</sup> Copelon points out that the tribunal's strongest evidence which it relied on in proving genocide was based on the evidence of rape and other SGBCs.<sup>418</sup> Her opinion that the Chamber recognised women not only as part of an ethnic group but also in their own right was drawn from the fact that the Chamber gave cognisance to the suffering encountered by the women and also sexual violence's 'role as a tool of their destruction and the destruction of the group'.<sup>419</sup> Hilary Charlesworth, however, in an earlier article, differs with Copelon. She states that:

The emphasis on the harm to the Tutsi people as a whole is, of course, required by the international definition of genocide, and the *Akayesu* decision on this point simply illustrates the inability of the law to properly name what is at stake: rape is wrong, not because it is a crime of violence against women and a manifestation of male dominance, but because it is an assault on a community defined only by its racial, religious, national or ethnic composition. In this account, the violation of a women's body is secondary to the humiliation of the group.<sup>420</sup>

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<sup>412</sup> Copelon 'Gender crimes as war crimes' at 227. Balthazar 'Gender Crimes and the International Criminal Tribunals' at 45 (noting that the ICTY stated that the definition of rape in domestic jurisdictions was too narrow).

<sup>413</sup> Obote-Odora 'Rape and sexual violence in international law' at 151.

<sup>414</sup> Cole notes that though the Trial Chamber did not specifically refer to its definition as being a 'conceptual approach', it was based on such by referring to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment's 'conceptual framework of state-sanctioned violence.' *Prosecutor v Akayesu* (Trial Judgment) para 687. Alison Cole, 'Prosecutor v Gacumbitisi: The new definition for prosecuting rape under international law' (2008) 8 *International Criminal Law Review* 55 at 57. See also Carson 'Reconsidering the Theoretical Accuracy' at 1265.

<sup>415</sup> *Celebici Judgment*, paras 478-479. This case was the first of its type to define rape by the ICTY.

<sup>416</sup> *Prosecutor v Alfred Musema* (Judgment and Sentence) Case No. ICTR-96-13-A, January 27, 2000, paras 226 and 229 (where the tribunal adopted the conceptual approach to rape given in the *Akayesu* judgment, rather than adopting the approach given by the *Furundizija* Trial Chamber. It also referred to the definition given in the *Akayesu* judgment as being conceptual). Though the sexual assault conviction was successfully overturned on appeal, the definition of rape was not appealed against. See *Prosecutor v Alfred Musema* (Appeal Judgment) Case No. ICTR-96-13-A, 16 November, 2001.

<sup>417</sup> Askin 'Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals' at 98.

<sup>418</sup> Copelon 'Gender crimes as war crimes' at 227.

<sup>419</sup> *Ibid.*

<sup>420</sup> Hilary Charlesworth 'Symposium on method in International Law, Appraising the methods of International Law: A Prospectus for readers' (1999) 93 *American Journal of International Law* at 386. See also Ray 'The shame of it' at 821 and 826-828 (stating that though the crimes inflicted against the women in former Yugoslavia can be prosecuted under article 4 of the ICTY Statute as genocide, perpetrators would be prosecuted under this article

*Akayesu* was thus the first case heard by an international tribunal in which the accused was convicted of genocide. In finding that rape and sexual violence can constitute genocide the Trial Chamber held that:

[W]ith regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, . . . one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm.<sup>421</sup>

By this finding, the court confirms that rape could evidence the commission of the crime of genocide in certain circumstances provided the genocidal intent accompanied the act of rape.

In considering the meaning of ‘serious bodily and mental harm’ under article 2(2)(b) of the ICTR Statute relating to genocide, the Trial Chamber held the term ‘to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution’.<sup>422</sup> The meaning of ‘imposing measures intended to prevent birth within the group’ under article 2(2)(d) of the ICTR Statute, relating to genocide was also considered by the Trial Chamber, and was construed as meaning ‘sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages’<sup>423</sup> as different forms of SGBCs. The Chamber further held that:

[I]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.<sup>424</sup>

Rape was also held to ‘be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.’<sup>425</sup>

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because the women are also members of an ethnic group just as the men. That prosecuting perpetrators under this article will not make them accountable for the gender specific violence which were inflicted on the women.). Copelon ‘Surfacing gender’ at 246-247 (making basically the same point as Charlesworth and Ray).

<sup>421</sup> *Prosecutor v Akayesu* (Trial Judgment) paras 731, 734 and 295.

<sup>422</sup> *Idem* para 504.

<sup>423</sup> *Idem* para 507.

<sup>424</sup> *Ibid.*

<sup>425</sup> *Idem* para 508.

Copelon argues that, contrary to what some scholars thought, the tribunal was right in not putting emphasis on the reproductive consequences of rape ‘as the hallmark of rape as a genocidal measure.’<sup>426</sup> Her reasoning for this is based on:

Rape and sexual violence are understood as instruments of genocide based primarily on the physical and psychological harm to the woman and secondarily on the potential impact of this on the targeted community. To emphasise the reproductive impact on the community would threaten once again to reduce the woman to being simply vehicles of the continuity of the targeted population. It would also tend towards a biological as opposed to socially constructed view of identity as the value intended to be protected by the concept of genocide.<sup>427</sup>

The ICTR decision in *Akayesu* also recognised rape and other forms of sexual violence as crimes in their own right which constituted crimes against humanity.<sup>428</sup> In adopting the definition of crimes against humanity in article 3 of the ICTR Statute, the Trial Chamber held that the act of rape must be committed ‘as part of a widespread or systematic attack, on a civilian population, on certain catalogued discriminatory grounds, namely national, ethnic, political, racial, or religious grounds.’<sup>429</sup> In commenting on rape as a crime in its own right, Balthazar states that it was an important finding by the Trial Chamber, as it recognised that the crime of rape cannot be isolated.<sup>430</sup> Forced nudity was also recognised by the tribunal as an inhumane act under the provision of crimes against humanity.<sup>431</sup>

The *Prosecutor v Furundzija*<sup>432</sup> case, the shortest to be tried by the ICTY,<sup>433</sup> is significant in that it did not follow the definition of rape given by the Trial Chamber in the *Akayesu* case, although it considered the definition and those from various domestic legal systems.<sup>434</sup> This departure from the use of the definition of rape in the *Akayesu* case was, in Cole’s view, a result of the Trial Chamber in the *Furundzija* case disapproving of the analogy placed by the *Akayesu* Trial Chamber with the conceptual approach used in the Torture

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<sup>426</sup> Copelon ‘Gender crimes as war crimes’ at 228.

<sup>427</sup> *Ibid.*

<sup>428</sup> *Prosecutor v Akayesu* (Trial Judgment) paras 696-697.

<sup>429</sup> *Idem* para 598.

<sup>430</sup> Balthazar ‘Gender Crimes and the International Criminal Tribunals’ at 44.

<sup>431</sup> *Prosecutor v Akayesu* (Trial Judgment) para 697. This was under count 14, under article 3(i) of the ICTR Statute.

<sup>432</sup> *Prosecutor v Furundzija*, (Trial Judgment).

<sup>433</sup> The decision was given four months after the *Akayesu* judgment and took the tribunal 11 days to try. Schaak ‘Obstacles on the road to Gender Justice’ at 386. Askin ‘Prosecuting wartime rape and other gender-related crimes’ at 330.

<sup>434</sup> *Prosecutor v Furundzija*, (Trial Judgment) paras 176-184. Wood ‘A woman scorned for the “Least condemned” war crime’ at 295.

Convention.<sup>435</sup> The *Furundzija* Trial Chamber's definition of rape, which is narrower than that of *Akayesu*, defined the elements of rape as:

- (i) [T]he sexual penetration, however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>436</sup>

The Chamber in the *Furundzija* case, thus, adopted a mechanical approach in defining the elements of rape, and also included what Sellers refers to as a 'gender neutral use' of a third person.<sup>437</sup> Although Askin welcomes the verdict and language used by the Chamber as being sensitive to gender-based crimes, she is of the opinion that the narrower definition of the elements of rape in *Furundzija* could amount to a regression from the definition given by the ICTR, though the judgment expands the protection given to victims of gender-based violence.<sup>438</sup> In a subsequent article Askin, however, praises the judgment in that it developed the law by recognising torture as a sexually violent crime. She is also of the view that the ICTY set an important precedent in international law by recognising that multiple rapes committed on a single victim is a serious violation of the law as a crime in its own right.<sup>439</sup> Pegorier is of the view that the *Furundzija*'s definition of rape is retrogressive in that it restricts the crime of rape to one of penetration, thereby limiting the definition given in the *Akayesu* case, which is broader and more progressive.<sup>440</sup> Palmer takes another view by stating that the definition of rape has been expanded by the ICTY by including oral and anal penetration, thereby, advancing the prosecution of sexual violence.<sup>441</sup> Though Swawk-Goldman finds the *Furundzija* definition of rape to be more technical than that of *Akayesu*, she concludes that both definitions do not

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<sup>435</sup> Cole 'Prosecutor v Gacumbitisi: The new definition for prosecuting rape under international law' at 59.

<sup>436</sup> *Prosecutor v Furundzija*, (Trial Judgment) para 185. Wood 'A Woman Scorned for the "Least Condemned" War Crime' at 295. Obote-Odora 'Rape and sexual violence in international law' at 151.

<sup>437</sup> Sellers 'The prosecution of sexual violence in conflict' at 20.

<sup>438</sup> *Prosecutor v Furundzija*, (Trial Judgment) para 185. See Askin 'Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals' at 113.

<sup>439</sup> Askin 'Prosecuting wartime rape and other gender-related crimes' at 332.

<sup>440</sup> Clotilde Pegorier 'Denial, Impunity and Transitional Justice: The Fate of Female Rape Victims in Bosnia and Herzegovina' in L Yarwood (ed) *Women and Transitional Justice: The Experience of Women as Participants* (Routledge) at 128.

<sup>441</sup> Amy Palmer 'An Evolutionary Analysis of Gender-Based War Crimes and The Continued Tolerance of 'Forced Marriage' (2009) 7 *Northwestern University Journal of International Human Rights* 133 at 142.



conflict.<sup>442</sup> In the *Furundzija* case, the Chamber also found the accused guilty of the crime of ‘outrages upon personal dignity’ including rape, as a war crime under article 3 of the statute.<sup>443</sup> This was because the accused’s presence and his continual interrogation of the victim was found to have aided and abetted the forced oral and vaginal intercourse which a soldier under his command had with the victim.<sup>444</sup>

The case of *Prosecutor v Kunarac et al*<sup>445</sup> decided by the ICTY was the first international hearing to convict two of the three accused for enslavement as crimes against humanity and for acts of sexual slavery under article 5 of the statute.<sup>446</sup> It was also the tribunal’s first conviction of an accused for rape as a crime against humanity,<sup>447</sup> and also as a war crime with regards to customary international law.<sup>448</sup> Askin contends that this case shows the close link between rape and enslavement.<sup>449</sup> Askin and Sellers are, however, of the opinion that the term sexual slavery would have been the preferred charge, rather than enslavement, since the conviction was based mainly on sexual slavery.<sup>450</sup>

In the *Kunarac* case, the Trial Chamber was of the opinion that rape, defined as a crime against humanity in paragraph (ii) of the *Furundzija* case, was narrowly stated for the requirements of international law. In its opinion the definition given in paragraph (ii) above of the findings in the *Furundzija* case (coercion or force or threat of force against the victim) did

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<sup>442</sup> Olivia Swaak-Goldman ‘Prosecutor v Delalic No. IT-96-21-T’ (1999) 93 *The American Journal of International Law* at 514.

<sup>443</sup> *Prosecutor v Furundzija*, (Trial Judgment) paras 270 -275

<sup>444</sup> *Idem* paras 41 and 274-275.

<sup>445</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, (Trial Judgment).

<sup>446</sup> Askin ‘Prosecuting wartime rape and other gender-related crimes’ at 333. Sellers ‘Gender Strategy is not a luxury for International Courts’ at 301. ICTY Statute, art 5(c). Two of the three accused (Kunarac and Kovac) were convicted of enslavement as crimes against humanity. See Case information Sheet, Kunarac, Kovac & Vukovic available at [www.icty.org/x/cases/kunarac/cis/en/ciskunaracalen.pdf](http://www.icty.org/x/cases/kunarac/cis/en/ciskunaracalen.pdf) (accessed 14 January 2015).

<sup>447</sup> *Ibid.* Mark Ellis ‘Breaking the silence: Rape as an international crime’ (2006-2007) 38 *Case Western Reserve Journal of International Law* 225, 229. Palmer ‘An evolutionary analysis of gender-based war crimes’ at 142. All three defendants were convicted of rape as a crime against humanity. Two of defendants (Kunarac and Vukovic) were convicted of torture as crimes against humanity. One of the defendants (Kovac) was found guilty of outrages upon personal dignity. See Case information Sheet, Kunarac, Kovac & Vukovic available at [www.icty.org/x/cases/kunarac/cis/en/ciskunaracalen.pdf](http://www.icty.org/x/cases/kunarac/cis/en/ciskunaracalen.pdf) (accessed 14 January 2015).

<sup>448</sup> See also *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeal Judgment) Case No. IT-96-23/1-A, June 12, 2002, paras 5, 11 and 18,

<sup>449</sup> Christopher S Maravilla ‘Rape as a War Crime: The Implications of the International Criminal Tribunal for Yugoslavia’s decision in Prosecutor v Kunarac, Kovac, Vukovic on International Humanitarian Law’ (2000-2001) 13 *Florida Journal of International Law* 321 at 339.

<sup>450</sup> Askin ‘Prosecuting wartime rape and other gender-related crimes’ at 340.

<sup>450</sup> *Idem* at 340.

‘not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.’<sup>451</sup> The *Kunarac* Trial Chamber defined rape as:

The *actus reus* of the crime of rape in international law is constituted by:  
the sexual penetration, however, slight:

- (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or
- (b) of the mouth of the victim by the penis of the perpetrator where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>452</sup>

The Appeals Chamber upheld the Trial Chamber’s definition of rape, upholding finding that there could be no consent to the appellant’s sexual acts in this case because of the coercive circumstances present.<sup>453</sup>

This is the first time that an international Trial Chamber has directly examined consent in rape without inferring lack of consent from the coercive circumstances in which the rape was committed.<sup>454</sup> The Chamber, thus, developed its own definition of rape by retaining the mechanical element of rape of the *Furundzija* judgment, but removing the requirement of coercion, force or threat of force. It adopted what Sellers refers to as ‘a two-pronged lack-of-consent requirement’.<sup>455</sup> First, the consent given by the victim must be voluntary and also given freely, determined by the surrounding circumstances at the time of the crime. The *mens rea* of rape which must be proved by the prosecutor is the intention of the accused to carry through with the prohibited sexual penetration knowing that the victim does not consent to it.<sup>456</sup> Following the

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<sup>451</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, (Trial Judgment) para 438.

<sup>452</sup> *Idem* para 460.

<sup>453</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeals Chamber Judgment) paras 128 and 133.

<sup>454</sup> Ryan S Lincoln ‘Too Rough a Justice: The Ethiopia-Eritrea Claims Commission and International Civil Liability for Claims for Rape under International Humanitarian Law’ (2012) 20 *Tulane Journal of International and Comparative Law* 385 at 393.

<sup>455</sup> *Ibid.* Sellers ‘The prosecution of sexual violence in conflict’ at 21.-P V Sellers (2007) ‘The “Appeal” of Sexual Violence: Akayesu/Gacumbitsi’, in *Gender-Base Violence in Africa*, Karen Stefisyn (ed.), University of Pretoria at 91.

<sup>456</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, (Trial Chamber Judgment) para 460. *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeals Chamber Judgment) paras 128 and 133.

*Kunarac* Appeals Chamber upholding the definition of rape given by the *Kunarac* Trial Chamber, certain ICTR cases such as *Semanza*<sup>457</sup> and *Kajelijeli*<sup>458</sup> adopted the definition.

Whilst Askin views the *Kunarac* definition as clarifying the elements of rape and torture in international law,<sup>459</sup> Obote-Odora opines that legal scholars have viewed this judgment as ‘a step backward from the *Akayesu* threshold’,<sup>460</sup> and considers the definition of rape handed down by the ICTY as restrictive.<sup>461</sup> Ellis’s opinion, however, is that the Trial Chamber’s definition of rape has broadened the requirement of non-consent, as it is more difficult to prove the narrower elements of coercion, force, and threats of force as required by the *Furundzija* judgment.<sup>462</sup> Maravilla, in considering the gender aspect of the definition, states that it is gender neutral by ensuring that rape is a crime against humanity, without distinguishing a victim on ground of sex, thus protecting women and men.<sup>463</sup> In referring to the *Kunarac* definition of rape, Carson’s opinion is that the elements of rape were further clarified by the Appeals Chamber.<sup>464</sup>

In *Gacumbitisi v Prosecutor*<sup>465</sup> the prosecution appealed to the ICTR Appeals Chamber against the Trial Chamber’s judgment on the significant issue of the definition of rape.<sup>466</sup> The

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<sup>457</sup> *Prosecutor v Semanza* (judgment and sentence) Case No. ICTR-97-20-T, May 15, 2003, para 345. Cole, refers to the ICTR cases automatically applying the *Kunarac* definition because it was ‘persuasive authority’ which did not need further analysis. Sellers on the other hand states that ICTR cases such as *Semanza* which followed the *Kunarac* decision were obligated to do so because of the *stare decisis* doctrine. Cole ‘Prosecutor v Gacumbitisi: The new definition for prosecuting rape under international law’ (2008) 8 *International Criminal Law Review* at 62. Sellers ‘The prosecution of sexual violence in conflict’ at 21. See also *Prosecutor v Zlatko Aleksovski*, (Appeals Chamber Judgment) Case, No. IT-95-14/1-A, March 24, 2000, paras 112-133 (where the Appeals Chamber stated when the *ratio decidendi* of its decisions are binding on Trial Chambers).

<sup>458</sup> *Prosecutor v Kajelijeli* (Trial Chamber Judgment and Sentence) Case No. ICTR 98-44A-T, December 1, 2003, 915. See also *Prosecutor v Muhimana* (Trial Chamber Judgment) Case No. ICTR-95-IB-T, April 28, 2005, para 549-551. The Trial Chamber, attempted to merge both the *Akayesu* and *Kunarac* definitions by stating that it endorsed ‘the conceptual definition of rape established in *Akayesu*, which encompasses the elements set out in *Kunarac*.’ It, however, ended up by adopting the definition in *Akayesu*.

<sup>459</sup> Askin ‘Prosecuting wartime rape and other gender-related crimes’ at 333-334.

<sup>460</sup> Obote-Odora ‘Rape and sexual violence in international law’ (2005-2006) 12 *New England Journal of International and Comparative Law* 135 at 152.

<sup>461</sup> *Idem* at 153.

<sup>462</sup> Ellis ‘Breaking the Silence: Rape as an International Crime’ (2006-2007) 38 *Case Western Reserve Journal of International Law* at 229

<sup>463</sup> Maravilla ‘Rape as a War Crime’ at 339-340.

<sup>464</sup> Carson ‘Reconsidering the theoretical accuracy’ at 1265. (‘The Appeal Chamber further clarified the elements of rape in holding that there is no requirement of resistance and that a showing of force is not required when the acts in question occur under coercive circumstances which effectively negate the possibility of consent.’)

<sup>465</sup> *Gacumbitisi v Prosecutor* (Appeal Judgment) Case No. ICTR-2001-64-A, July 7.

<sup>466</sup> The Trial Chamber tried to reconcile both definitions of rape in *Akayesu* and *Kunarac* by merging both approaches, as was done by the *Muhimana* Trial Chamber. As a result of this, its definition did not conclusively state if proof of non-consent was a necessary requirement of the element of rape. Cole, ‘Prosecutor v Gacumbitisi: The new definition for prosecuting rape under international law’ at 67-68. *Prosecutor v Gacumbitisi*, (Trial

prosecution asked the Appeals Chamber to clarify as a matter of ‘general significance’ the law relating to rape as a crime against humanity and also as an act of genocide, with particular reference to the element of non-consent.<sup>467</sup> This was the first time that an Appeals Chamber was seized of the issue after the conflicting judgments in the *Akayesu* and *Kunarac* cases.<sup>468</sup> The Appeals Chamber adopted the interpretation of rape given in the *Kunarac* appeal judgment, that is, the required elements of the crime of rape as a crime against humanity are proof beyond a reasonable doubt of the absence of consent of the victim and that the accused was aware of such non-consent.<sup>469</sup> It also ruled that absence of consent might be inferred from existing coercive circumstances, without having to actively prove that the victim did not consent.<sup>470</sup> This latter element of the crime held by the Appeals Chamber has, in Mackinnon’s opinion, kept in place the crux of the *Akayesu* definition of rape.<sup>471</sup> Schomburg and Paterson conclude that the judgment has clarified that the prosecution does not have to adduce evidence of non-consent from the victim, and that this was an improvement from earlier decisions as it protected the victim from being questioned about consent.<sup>472</sup> They then point out that the Appeals Chamber would still need to resolve the tensions regarding substantive law issues despite having developed a practical solution regarding procedural issues.<sup>473</sup> Sellers cites an earlier article of hers, where she concludes that the *Gacumbitsi* Appeals Chamber should have overruled as *per incuriam*<sup>474</sup> the decision given by the *Kunarac* Appeals Chamber<sup>475</sup> because, as described above, the *Kunarac* Appeals Chamber summarily rejected relevant municipal rape laws dealing with prison rapes and other such sexual abuses which do not require proof of consent.<sup>476</sup> Also, the

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Judgment) Case No. ICTR- 2001-64-T, June 17, 2004, paras 321 and 325. *Prosecutor v Muhimana*, (Trial Judgment) Case No. ICTR-95-IB-T, April 28, 2005, para 549-551.

<sup>467</sup> *Gacumbitsi v Prosecutor* (Appeal Judgment) Case No. ICTR-2001-64-A, July 7, 2006, paras 147 and 150.

<sup>468</sup> Cole ‘Prosecutor v Gacumbitsi: The new definition for prosecuting rape under international law’ at 49, 55-56 and 68.

<sup>469</sup> *Gacumbitsi v Prosecutor* (Appeal Judgment) para 152.

<sup>470</sup> *Idem* para 155

<sup>471</sup> Catherine A. Mackinnon ‘The ICTR’s Legacy on Sexual Violence’ (2008) 14 *New England Journal of International and Comparative Law* 211 at 213.

<sup>472</sup> Wolfgang Schomburg and Ines Paterson ‘Genuine Consent to Sexual Violence under International Criminal Law’ (2007) 101 *American Journal of International Law* 121 at 140.

<sup>473</sup> *Ibid.*

<sup>474</sup> A *per incuriam* decision made by a court is one which ignores a ‘contradictory statute or binding authority.’ Since it has been decided wrongly, it is of no force.

<sup>475</sup> Sellers ‘The prosecution of sexual violence in conflict’ at 23-24 (citing Patricia V Sellers ‘The “Appeal” of Sexual Violence: Akayesu/Gacumbitsi’, in *Gender-Based Violence in Africa*, Karen Stefisyn (ed.), at 91.

<sup>476</sup> *Ibid.*

*Kunarac* Appeals Chamber relied solely on national definitions of rape law.<sup>477</sup> In Sellers' opinion this should have been corrected by the *Gacumbitsi* Appeals Chamber.<sup>478</sup>

## 2.5 THE INTERNATIONAL CRIMINAL COURT

The Rome Statute established the ICC <sup>479</sup> after the United Nations Diplomatic Conference of Plenipotentiaries adopted the statute on 17 July 1998.<sup>480</sup> The statute came into force after obtaining 60 ratifications on 1 July, 2002. It is the first international treaty which recognises various forms of SGBCs, apart from rape,<sup>481</sup> as crimes against humanity and war crimes. The ICC's jurisdiction is limited to try 'the most serious crimes of concern to the international community as a whole'.<sup>482</sup> These crimes are genocide,<sup>483</sup> crimes against humanity,<sup>484</sup> war crimes<sup>485</sup> and the crime of aggression.<sup>486</sup> When a state party refers a situation to the ICC or the Prosecutor acts *proprio moto*, the ICC can exercise its jurisdiction over these crimes, where they

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<sup>477</sup> *Ibid.*

<sup>478</sup> *Idem* at 24.

<sup>479</sup> Rome Statute to the International Criminal Court, UN Doc A/CONF 183/9, 17 July 1998, 2187 UNTS 90, 37 ILM 1002, 1030.

Halley describes the Rome Statute as 'the highest-order code for the ICC'. The statute defines the scope of the ICC's jurisdiction. It also sets up the various institutional authorities of the Court providing for the 'interpretive rules for the ICC to use in construing the Statute', and authorises the promulgation of rules of evidence and further definition of crimes. Janet Halley 'Rape at Rome: Feminist interventions in the criminalization of sex-related violence in positive international criminal law' (2008) 30 *Michigan Journal of International Law* 1 at 10.

<sup>480</sup> Roy S Lee 'The Rome Conference and the Contributions to International Law' in Roy S Lee (ed) *The International Criminal Court, The Making of the Rome Statute Issues, Negotiations, Results*, (1999) at 1-2 (stating that the ICC was one of the projects which was laid before the United Nations General Assembly for consideration in the 1940s. Due to controversy about the creation of the ICC, the proposal was not carried out.)

Thomas H Clark 'The Prosecutor of the International Criminal Court, amnesties, and the "Interests of justice": Striking a delicate balance' (2005) 4 Washington University Global Studies Law Review 389 at 392 (stating that the historical roots of the ICC can be traced to 1899).

<sup>481</sup> Cate Steains 'Gender Issues' in Roy S Lee (ed) *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results*, (1999) 357 at 357. A Windney Brown and Laura Grenfell 'The international crime of gender-based persecution and the Taliban (2003) 4 *Melbourne Journal of International Law* at 347 (stating that 'the Rome Statute is the only binding international instrument that explicitly recognises gender-based persecution').

<sup>482</sup> Rome Statute, art 5.

<sup>483</sup> *Idem* arts 5(a) and 6.

<sup>484</sup> *Idem* arts 5(b) and 7.

<sup>485</sup> *Idem* arts 5(c) and 8.

<sup>486</sup> *Idem* arts 5(d) and 9.

were committed on the territory of a state party or by a national of a state party.<sup>487</sup> In the case of territorial jurisdiction, the nationality of the accused is irrelevant. With regard to the ICC exercising its jurisdiction over a national of a state party, it is irrelevant whether the accused committed the crime on the territory of a state party or non-state party. In the case of the ICC exercising its jurisdiction over these crimes when the UNSC acts under Chapter VII of the UN Charter, by referring a situation to the ICC, these restrictions will not apply; the ICC can exercise its jurisdiction over any territory or national.<sup>488</sup> The situation of a case referred to the ICC, by the UNSC acting under Chapter VII of the UN Charter must be ‘a threat to international peace and security’. The ICC’s jurisdiction extends to crimes committed after it came into force. Also, crimes committed in a state which ratifies the Rome Statute after 1 July 2002 would come within the ICC’s jurisdiction where that state makes a declaration under article 12(3) of the Rome Statute.<sup>489</sup>

### 2.5.1 The inclusion of gender in the Rome Statute.

The creation of the ICC has been described by scholars as a ‘monumental response to ‘the most serious crimes of concern to the international community as a whole’,<sup>490</sup> ‘an important step forward for humankind’<sup>491</sup> and also ‘the most powerful symbol of the progress made in the fight against impunity for international crimes’.<sup>492</sup> Hard work and lobbying by the Women’s Caucus for Gender Justice in the ICC (Women’s Caucus),<sup>493</sup> resulted in the Rome Statute capturing a gender sensitive perspective.<sup>494</sup>

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<sup>487</sup> *Idem*, art 12.

<sup>488</sup> *Idem*, art 13.

<sup>489</sup> *Idem* art 11. Rome Statute, art 12(3) provides that:

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may by declaration lodge with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

<sup>490</sup> Clark ‘The Prosecutor of the International Criminal Court, amnesties’ at 389

<sup>491</sup> Barbara Bedont and Katherine Hall-Martinez ‘Ending Impunity for Gender Crimes and the International Criminal Court’ (1999) 6 *Brown Journal of World Affairs* 65 at 65.

<sup>492</sup> This statement was made by the United Nations High Commissioner for Human Rights, Zeid Ra’ad Al Hussein. Women’s Initiatives for Gender Justice, *Is the international community abandoning the fight against impunity?* available at [www.iccwomen.org/news/docs/WI-WomVoices3.../WomVoices3-15.ht...](http://www.iccwomen.org/news/docs/WI-WomVoices3.../WomVoices3-15.ht...) (accessed 17 February 2015).

<sup>493</sup> The Women’s Caucus for Gender Justice in the ICC is a grouping of feminist and human rights women organisations from all parts of the world.

<sup>494</sup> Bedont and Hall-Martinez ‘Ending Impunity for Gender Crimes’ at 65 and 67 (stating how the in the early stages of the Rome Statute’s drafting, little attention was given to gender issues by governments and mainstream human rights groups. The authors also give an account of the opposition which the Women’s Caucus for Gender Justice faced in getting gender and sexual crimes and issues addressed). Valerie Oosterveld ‘The definition of “Gender” in

The term ‘gender’ included in the Rome Statute is considered a victory for the Women’s Caucus, which pushed for the term to be included, rather than the term ‘sex’.<sup>495</sup> Before the statutes of the ICTY and ICTR were drafted,<sup>496</sup> men drafted conventions and treaties, in such a way that they reflected the ‘gender bias towards SGBCs such as rape’.<sup>497</sup> Although there were mixed feelings about the term ‘gender’ in the Rome Statute, it did away with the gender bias towards men or women, recognising that men could also be victims of rape. Bedont and Hall-Martinez considered the inclusion of the term ‘gender’ and ‘gender crimes’ instead of the terms ‘sex’ and ‘sex crimes’ in the Rome Statute as a ‘significant victory’ because they considered terms ‘sex’ and ‘sex crimes’ to be narrower in scope.<sup>498</sup> The inclusion of the terms ‘gender’ and ‘gender crimes’ was widely regarded as positive because the use of the terms would serve to continue the well-established practice of them being used in international instruments. Bedont and Hall-Martinez also argued that the use of the words, ‘context of society’, within the definition of ‘gender’, covered the sociological differences between the two sexes’.<sup>499</sup> Although the inclusion of the term ‘gender’ was welcomed, the qualification of the term in the Rome Statute was also considered a failing. The Rome Statute defines ‘gender’ as ‘two sexes, male and female, within the context of society’.<sup>500</sup> The article goes on to state that ‘[t]he term “gender” does not indicate

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the Rome Statute of the International Criminal Court: A step forward or back for International Criminal Justice?’ (2005) 18 *Harvard Human Rights Journal* at 56-66 (giving an account of the negotiations involved in getting the word ‘gender’ included in the statute and the opposition faced). Oosterveld played an active part in the negotiation of the definition of ‘gender’. Brook S Mosham ‘Women, war and words: The Gender component in the Permanent International Criminal Courts definition of crimes against humanity’ (1998-1999) 22 *Fordham International Law Journal* 154 at 171 (stating that ‘gender issues framed some of the most fiercely contested debates at the PrepCom Sessions and the Rome Conference.’) Cate Steains ‘Gender Issues’ in Roy S Lee (ed) *The International Criminal Court, The Making of the Rome Statute Issues, Negotiations, Results*, (1999) at 360 (stating that the draft Rome Statute, which was prepared by the International Law Commission in 1994, did not contain any reference to gender issues. Omitting gender issues from the draft Rome Statute, resulted in the Ad Hoc and Preparatory Committee, at the early stages of negotiations, paying little attention to gender issues, and considering other issues which were considered more important, such as complementarity and how the ICC’s jurisdiction could be triggered). The full title of the PrepCom is Preparatory Committee on the Establishment of an International Criminal Court. The PrepCom was established in December 1995 by the United Nations General Assembly, to prepare a draft text of the statute for a diplomatic conference to consider. Mosham ‘Women, war and words’ at 169.

<sup>495</sup> Halley ‘Rape at Rome’ at 82.

<sup>496</sup> The definition of rape adopted by the ICTY and ICTR is gender neutral.

<sup>497</sup> Goldstone ‘Prosecuting rape as a war crime’ at 279 (stating that ‘Men had written the laws of war in an age when rape was regarded as being no more than an inevitable consequence of war.’ Christopher Maravilla ‘Rape as a war crime: The implications of the International Criminal Tribunal for the Former Yugoslavia’s decision in Prosecutor v Kunarac, Kovac, Vukovic on international humanitarian law’ (2000-2001) 13 *Florida Journal of International Law* 321 at 339 (stating that ‘one of the problems with International Conventions and Treaties thus far with regard to rape has been the gender bias of the male diplomats charged with drafting.’)

<sup>498</sup> Bedont and Hall-Martinez ‘Ending Impunity for Gender Crimes’ at 68.

<sup>499</sup> *Ibid.*

<sup>500</sup> The term gender can also be found in the Rome Statute arts 7(1) (h), 21(3), 42(9), 54(1) and 68(1).

any meaning different from the above'.<sup>501</sup> As pointed out by Oosterveld, there were mixed reactions as to the definition of the term 'gender'. Scholars such as Crossman, referred to it as 'stunningly narrow', and Moshan as 'a failure', whilst Charlesworth is quoted as stating that it wrongfully 'elides the notions of "gender" and "sex," making "gender" mean the same as biological "sex" and therefore recognising that gender is a constructed and contingent set of assumptions about female and male roles'.<sup>502</sup> Oosterveld quotes those who welcomed the definition of gender as stating that it was 'consistent with other, more clearly stated formulations adopted within the United Nations.'<sup>503</sup> Moshan considers the definition of 'gender' a failure, as qualifying it went against the wishes of the women activists, who believed that by so doing, it would make it difficult to prosecute gender-based crimes. She is of the same opinion as the women activists that it is an unworkable and unpractical term.<sup>504</sup> Hamid, on the other hand, focuses on the construction of article 7(1) (g) of the Rome Statute.

## 2.5.2 Defining gender crimes in the Rome Statute.

The codification of rape and other forms of SGBCs in the Rome Statute as crimes against humanity and war crimes<sup>505</sup> is a significant advancement for international humanitarian and criminal law.<sup>506</sup> Together with rape, 'sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'<sup>507</sup> they have

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<sup>501</sup> *Idem* art 7(3).

<sup>502</sup> Oosterveld 'The definition of "Gender" in the Rome Statute' (2006) 18 *Harvard Human Rights Journal* at 55-56.

<sup>503</sup> *Ibid.*

<sup>504</sup> Moshan 'Women, war and words' at 178-179.

<sup>505</sup> Persecution based on gender is prohibited by the Rome Statute, which was not the case with the ICTY and ICTR Statutes. Rome Statute, art 7(1)(h) provides that :

Persecution against any identifiable group or collectivity on political, racial national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

See also Ellis 'Breaking the silence: Rape as an international crime' at 241.

<sup>506</sup> Valerie Oosterveld 'Gender persecution and the International Criminal Court: Refugee law's relevance to the crime against humanity of gender-based persecution' (2006) 17 *Duke Journal of Comparative and International Law* 49. Though persecutors of the crimes of sexual slavery and sexual violence have been convicted by the ICTY and ICTR, these crimes are not listed in the ICTY or ICTR Statutes – only rape is listed as a crime against humanity under article 5(g) of the ICTY Statute, and Article 3(g) of the ICTR Statute. Article 4(e) of the ICTR Statute lists rape, together with other gender-based crimes as war crimes which are outrages upon one's personal dignity. Steains 'Gender Issues' at 362-363 (referring to the OTP in the ICTY being able to prosecute for rape and other gender-based crimes under other articles of the statute as doing so 'through creative interpretation of the Statute'.)

<sup>507</sup> Rome Statute arts 7(1) (g), 8(2)(b)(xxii), 8(2)(e)(vi).



been included as crimes against humanity and war crimes in separate sub-paragraphs.<sup>508</sup> This is significant as it shows that these crimes are recognised in their own right and are peculiar to women.<sup>509</sup> Brown and Grenfell, however, observe that the codification of these crimes is not new, as the Rome Statute codifies existing customary international law.<sup>510</sup> Scholars such as Hamid, however, take issue with the construction of article 7(1)(g) of the Rome Statute on the ground that the article still puts women in a subordinate position, as the crimes of sexual violence are isolated in the article and as a result sexual violent crimes are not ‘part of the narrative of larger sexual offending’.<sup>511</sup>

Under the Rome Statute, an act of rape can constitute genocide when ‘committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.<sup>512</sup> In addition, ‘acts of torture. . . sexual violence or inhuman or degrading treatment’ may constitute genocide when ‘serious bodily or mental harm’ was caused ‘to one or more persons’.<sup>513</sup> Rape and other criminal acts mentioned in article 7(1)(g) of the Rome Statute are crimes against humanity ‘when committed as part of a widespread or systematic attack directed against any

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<sup>508</sup> Mosham ‘Women, war and words’ at 177 and 181. Cate Steains ‘Gender Issues’ at 363 (pointing out that the reason why article 6, which relates to genocide does not specifically refer to SGBC, is because during the PrepCom negotiations the drafters wanted to maintain the definition of genocide found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.)

<sup>509</sup> Mosham ‘Women, war and words’ at 177 and 181. Ellis ‘Breaking the silence: Rape as an international crime’ at 235. Maravilla ‘Rape as a war crime’ at 340 warning that gender bias could also occur against men by stating that ‘[t]he same gender bias that originally did not include rape as a war crime could lend itself to the erroneous conclusion that only women can be raped. This reflects the societal stigma upon men who are subjected to rape.’ Mouthaan is of the opinion that crimes such as punching or electro-shock to genitals, forced nudity and sexual mutilation, should also have been included in the Rome Statute. This suggests that certain other crimes which are committed against men were not included in the Rome Statute. Solange Mouthaan ‘The prosecution of gender-based crimes at the International Criminal Court: Challenges and opportunities’ (2011) 11 *International Criminal Law Review* 775 at 786.

<sup>510</sup> Brown and Grenfell support their argument by referring to the International Committee of the Red Cross statement that ‘war crimes, crimes against humanity and genocide are already subject to universal jurisdiction under customary international law’. They also referred to Meron who stated that the Rome Statute ‘codifies many rules and principles of IHL as customary criminal law’. Brown and Grenfell ‘The international crime of gender-based persecution and the Taliban’ (2003) 4 *Melbourne Journal of International Law* at 358.

<sup>511</sup> Noor Hamid ‘The Untold Story of the Girl Soldiers of the Congo: The International Criminal Court Case of the Prosecutor v Lubanga’ at 1, 4 and 5 available at <https://cdn.auckland.ac.nz/assets/humanrights/.../Noor-Hamid-final.pdf> (accessed 17 February 2015).

<sup>512</sup> Rome Statute, art 6.

<sup>513</sup> ICC, Elements of Crimes, ISBN No 92-9227-232-2, art 6(b). The Elements of Crimes was adopted by a two-thirds majority of the Assembly of State Parties on 9 September 2002 and entered into force on the same day. See Rome Statute, art 9(1) which provides that the Elements of Crimes. . . shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.’

civilian population, with knowledge of the attack’.<sup>514</sup> Article 7(2) defines an ‘attack directed against any civilian population’ as:

A course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.<sup>515</sup>

The Elements of Crimes (EOC) provides conditions for the conduct of rape and the other criminal acts under article 7(1)(g). As with article 7(1)(g), the EOC also provides that the conduct must be committed ‘as part of a widespread or systematic attack directed against a civilian population’.<sup>516</sup> The perpetrator’s [’] knowledge is also an important condition. The EOC thus provides for the perpetrator knowing ‘that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population’.<sup>517</sup> There are, therefore, five contextual elements involved in a crime against humanity:

- An attack directed against any civilian population;
- A State or organisational policy;
- An attack of a widespread or systematic nature;
- A nexus between the individual act and the attack; and
- Knowledge of the attack.<sup>518</sup>

Regarding war crimes, SGBCs may either be committed in an international or non-international armed conflict situation. SGBCs listed in article 8(2)(b)(xxii) of the Rome Statute can be committed in an international armed conflict situation, whilst those listed in article 8(2)(e)(vi) in a non-international armed conflict situation. As noted in chapter 1,<sup>519</sup> the definition of armed conflict, which the ICC has adopted, was defined by the Appeals Chamber in the *Prosecutor v Dusko Tadic* case as existing ‘whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or

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<sup>514</sup> Rome Statute, art 7(1).

<sup>515</sup> See also ICC, Elements of Crimes, art 7(3).

<sup>516</sup> *Idem* art 7(1)(c) para 2—enslavement, art 7(1)(g) -1 para 3 – rape, art 7(1)(g) -2 para 3 – sexual slavery, art 7(1)(g)-3 para 3– enforced prostitution, art 7(1)(g)-4 para 2 – forced pregnancy, art 7(1)(g)-5 para 3 – enforced sterilization, art 7(1)(g)-6 para 4 – sexual violence.

<sup>517</sup> *Idem* art 7(1)(c) para 3—enslavement, art 7(1)(g) -1 para 4 – rape, art 7(1)(g) -2 para 4 – sexual slavery, art 7(1)(g)-3 para 4– enforced prostitution, art 7(1)(g)-4 para 3 – forced pregnancy, art 7(1)(g)-5 para 4 – enforced sterilization, art 7(1)(g)-6 para 5 – sexual violence.

<sup>518</sup> Republic of Cote D’Ivoire: ‘Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Cote D’Ivoire’ ICC-02/11, 3 October 2011 at para 29.

<sup>519</sup> Chapter 1at 20.

between such groups within a state'.<sup>520</sup> As war crimes are applicable in an international armed conflict situation relating to SGBCs listed in the Rome Statute, article 8(2)(b) provides that war crimes means:

Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:<sup>521</sup>

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;<sup>522</sup>

For each of the criminal acts mentioned in article 8(2)(b)(xxii), the EOC requires the mental element, namely that 'the perpetrator was aware of the factual circumstances that established the existence of an armed conflict'.<sup>523</sup>

An armed conflict is international in character:

[i]f it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international - or, depending on the circumstances, be international in character alongside with an internal armed conflict - if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).<sup>524</sup>

With regard to war crimes relating to SGBCs committed in a non-international armed conflict situation, article 8(2)(e) provides that war crimes means:

Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:<sup>525</sup>

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.<sup>526</sup>

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<sup>520</sup> *Prosecutor v Dusko Tadic* 'Decision on the defence motion for interlocutory appeal on jurisdiction' (Appeals Chamber) para 70 (2 October 1995) IT-94-1-A. See for example, *Prosecutor v Jean-Pierre Bemba Gombo* case. *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment pursuant to Article 74 of the Statute' ICC-01/05-01/08 (21 March 2016) para 128.

<sup>521</sup> Rome Statute, art 8(2)(b).

<sup>522</sup> *Idem* art 8(2)(b) (xxii).

<sup>523</sup> ICC, Elements of Crimes, art 8(2)(b)(xxii)-1, para 4 - rape, art 8(2)(b)(xxii) - 2, para 4 - sexual slavery, art 8(2)(b)(xxii) -3, para 4- enforced prostitution, art 8(2)(b)(xxii) - 4, para 3 – forced pregnancy, art 8(2)(b)(xxii) - 5, para 4 – enforced sterilization, art 8(2)(b)(xxii) - 6, para 5 – sexual violence.

<sup>524</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* 'Decision on the confirmation of charges' ICC-01/04-01/07 (30 September 2008) para 238 referring to the definition which was held in the *Lubanga* case which adopted the definition of the International Court Justice in the *Democratic Republic of Congo v. Uganda* case.

<sup>525</sup> Rome Statute art 8(2)(e).

<sup>526</sup> *Idem* art 8(2)(e)(vi).

The same mental element applies for non-international armed conflicts as with international armed conflict, that is, ‘the perpetrator was aware of the factual circumstances that established the existence of an armed conflict’.<sup>527</sup>

The Trial Chamber has held that sexual violence as enumerated in articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute is not ‘limited to acts constituting grave breaches of the Geneva Conventions of 1949 or serious violations of Common article 3’.<sup>528</sup> The implication of this is that combatants in ‘same armed force are not *per se* excluded as potential victims of the war crimes’.<sup>529</sup>

Apart from the contextual elements already mentioned to prove sexual crimes as crimes against humanity, or war crimes of an international or non-international nature, other contextual elements relating to each individual sexual crime enumerated in the statute must be proved to establish that crime. Rape and sexual slavery are two of the sexual violent crimes which have mainly been prosecuted as crimes against humanity and war crimes, before the ICC. Consideration is, therefore, given to the other elements required to prove these two crimes.

### **2.5.2(i) *Rape constituting genocide, a crime against humanity and war crime***

As the elements of rape are codified in the EOC, the ICC will not have to refer to other legal systems for a definition of rape, as was the case in the ICTY and ICTR.<sup>530</sup> This is because the EOC assist the ICC ‘in the interpretation and application’ of crimes within its jurisdiction.<sup>531</sup> As a crime against humanity under article 7(1)(g) of the Rome Statute and war crimes under articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute, other elements necessary to establish the crime of rape as provided in the EOC are:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object of any other part of the body.

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<sup>527</sup> ICC, Elements of Crimes, art 8(2)(e)(vi)-1, para 4 - rape, art 8(2)(e)(vi) - 2, para 4 - sexual slavery, art 8(2)(e)(vi) -3, para 4- enforced prostitution, art 8(2)(e)(vi) - 4, para 3 – forced pregnancy, art 8(2)(e)(vi) - 5, para 4 – enforced sterilization, art 8(2)(e)(vi) - 6, para 5 – sexual violence.

<sup>528</sup> *Prosecutor v Bosco Ntaganda* ‘Second decision on the defence’s challenge to the jurisdiction of the court in respect of Counts 6 and 9’ ICC-01/04-02/06 (4 January 2017) paras 39 and 54.

<sup>529</sup> *Idem* para 54.

<sup>530</sup> Ellis ‘Breaking the silence: Rape as an international crime’ at 239.

<sup>531</sup> ICC Elements of Crimes, art 9(1).

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>532</sup>

Though the definition is similar to that used in the *Furundzija* case, it has been modified so that the invasion of the victim's body is 'broad enough to be gender-neutral'.<sup>533</sup> Thus, the first constituent element of rape is where the perpetrator invades a person's body by conduct which results in penetration with a sexual organ. Apart from penetration of the vagina, this would include, for example, penetration of the victim's mouth with a sexual organ.<sup>534</sup> Penetration of the victim's anal or genital opening with any object or any other part of the victim's body can also constitute rape. Invasion, therefore, includes same-sex penetration, and invasive conduct by male and female perpetrators or victims who are male or female.<sup>535</sup> The second constituent element provides the circumstances and conditions in which invading a victim's body attracts criminal character.<sup>536</sup> An example provided in the EOC is where the invasion was committed by force because the victim or another person was under duress or in detention. The only reference to lack of consent which the EOC refers to is when the invasion of the perpetrator or victim's body is committed against a person who is incapable of giving genuine consent, that is, a person who is 'affected by natural, induced or age-related incapacity'.<sup>537</sup> The prosecution in this situation, has to prove that 'the victim's capacity to give genuine consent was affected by natural, induced, or age-related incapacity'.<sup>538</sup> In all other circumstances, a victim's lack of consent does not have to be proved as the EOC does not refer to it. No provision for *mens rea* for rape is made in the Rome Statute or EOC. Reference therefore must be made to article 30 of the Rome Statute, where 'intent' and 'knowledge' are a legal requirements. In proving 'intent' it must be proved 'that the perpetrator intentionally committed the act of rape' or that the 'perpetrator meant to

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<sup>532</sup> *Idem* art 7(1) (g)-1, 8(2) (b)(xxii)-1 and 8(2)(e)(vi)-1. The Elements of Crimes also provides the elements for the other gender-based crimes. See also, for example Situation in the Republic of Cote d'Ivoire, Public 'Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Cote d'Ivoire' (3 October 2011) ICC-02/11, para 68 where the Pre-Trial Chamber referred to the Elements of Crimes, Article 7(1) (g)-1 as establishing the crime of rape.

<sup>533</sup> ICC, Elements of Crimes, articles 7(1) (g)-1, 8(2)(b)(xxii)-1 and 8(2)(e)(vi)-1. Wood 'A woman scorned for the "Least condemned" war crime' at 296.

<sup>534</sup> *Prosecutor v Jean-Pierre Bemba Gambo* 'Judgment pursuant to article 74 of the Statute' (21 March 2016) ICC-01/05-01/08, para 101.

<sup>535</sup> *Idem* para 100.

<sup>536</sup> *Idem* para 102.

<sup>537</sup> ICC Elements of Crimes footnote 16 and 64.

<sup>538</sup> *Prosecutor v Jean-Pierre Bemba Gambo* 'Judgment pursuant to article 74 of the Statute' para 107.

engage in the conduct in order for penetration to take place'.<sup>539</sup> In the case of knowledge, the prosecutor must prove that the 'perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.'<sup>540</sup> Intent and knowledge are additional to the requirement of the perpetrator's 'awareness of the factual circumstances that established the existence of an armed conflict'.<sup>541</sup>

### **2.5.2(ii) *Sexual slavery as a crime against humanity and war crime***

As a crime against humanity under article 7(1)(g) of the Rome Statute and war crime under articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute, other elements necessary to establish the crime of sexual slavery as provided in the EOC are:

The perpetrator exercised any or all the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.<sup>542</sup>

The Trial Chamber in the *Katanga* case avowedly adopted a case-by-case approach when considering 'the exertion of powers which may be associated with the right of ownership or which may ensue therefrom'.<sup>543</sup> Various factors which the ICC may take into account include:

Detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim's vulnerability and the socioeconomic conditions in which the power is exerted'.<sup>544</sup>

The Trial Chamber also stated 'that the exercise of the right of ownership over someone need not entail a commercial transaction'.<sup>545</sup>

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<sup>539</sup> Rome Statute, art 30(2). *Prosecutor v Jean-Pierre Bemba Gambo* 'Judgment pursuant to article 74 of the Statute' para 111.

<sup>540</sup> *Idem* art 30(3). *Idem* para 112.

<sup>541</sup> *Prosecutor v Germain Katanga* 'Judgment pursuant to article 74 of the Statute' ICC-01/04-01/07 (7 March 2014) para 972.

<sup>542</sup> ICC, Elements of Crimes art 7(1)(g) - 2 paras 1 and 2, art 8(2)(b)(xxii) – 2 paras 1 and 2, art 8(2)(e)(vi) - 2, paras 1 and 2.

<sup>543</sup> *Prosecutor v Germain Katanga* 'Judgment pursuant to article 74 of the Statute' ICC-01/04-01/07 (7 March 2014) para 976.

<sup>544</sup> *Ibid.*

<sup>545</sup> *Ibid.*

## 2.6 CONCLUSION

This chapter examined the marginalisation of SGBCs, particularly rape committed in armed conflicts at the international level. Although early documents prohibited rape, wartime rape was permitted, for example, to boost the morale's of soldiers, as a means of subjugating the side that lost the war as women were considered men's property, and because rape was considered an inevitable consequence of war, or collateral damage to be tolerated. Later, legal documents were constructed so as to make rape an offence against a woman's honour and dignity, rather than a crime against her. With the first codification of crimes against humanity by the IMT after World War II, rape was not included as a crime in its own right (unlike crimes such as murder), but was subsumed by implication under the catch-all phrase 'other inhumane acts'. Neither were other tribunals, such as the Tokyo Tribunal, very successful in prosecuting rape, as observed in the 'comfort women's situation, even though rape was a crime included in its indictment. Rape and other SGBC's were excluded from the 'grave breaches' list of the Geneva Convention and not mentioned in common article 3 of the Geneva Conventions, thus raising doubts as to the gravity of these crimes at the international level. Such marginalisation of rape and other SGBCs led to the struggle by feminist scholars and women's human rights organisations to get SGBCs recognised in their own right. The inclusion of SGBCs in the *ad hoc* tribunals' statutes and the Rome Statute as genocide, war crimes, and/or crimes against humanity have undoubtedly brought the recognition of these crimes to the forefront. Both the ICTY and ICTR developed a definition of rape, as there was no agreed definition at international level before their formation. This has helped to halt the misperception that women are men's property and can be maltreated, and has helped erase the concept that rape is an offence against a woman's honour and dignity rather than an offence against her person, or that rape committed in an armed conflict situation is an inevitable consequence of war, or collateral damage to be tolerated. Unfortunately, it took the atrocities which occurred in the former Yugoslavia and Rwanda for the international community to respond to the cries of feminists and women's human rights organisations. Perhaps if the international community had acted earlier, the experience of women might have been different.

The chapter also reveals the teething problems faced by the ICTY and ICTR in applying the statutes in armed conflict situations with respect to SGBCs, particularly in instances of rape. Different interpretations of rape were adopted by the tribunals in cases such as *Prosecutor v Akayesu*, *Prosecutor v Furundzija* and *Prosecutor v Kunarac et al.* Despite this, the

jurisprudence of these two tribunals helped pave the way for the codification of SGBCs in the Rome Statute, although only rape was codified in the ICTY and ICTR statutes.

Although the inclusion of SGBCs in international treaties is welcomed, it is suggested that the inclusion of these crimes in international treaties is just one step towards getting them recognised or acknowledged by the international community as crimes which cannot be condoned and consequently must be prosecuted. As will be observed in chapters three and four, investigating and prosecuting SGBCs at the ICC has been challenging. Since the ICC came into force in 2002, it has not had a successful conviction for SGBV. It is not only necessary to have SGBCs committed in armed conflicts included in treaties to prevent their marginalisation, but they must be effectively investigated and prosecuted to prevent impunity for these crimes. The next two chapters consider the investigation and prosecution of SGBCs committed in armed conflict before the ICC. By effectively investigating and prosecuting SGBCs, it is suggested that the impunity gap for these crimes will be bridged, as a result of which victims of these crimes can obtain justice.



## CHAPTER 3

### THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT'S DISCRETIONARY POWERS IN BRIDGING THE IMPUNITY GAP IN SEXUAL AND GENDER-BASED VIOLENCE COMMITTED DURING ARMED CONFLICTS

*The Office of the Prosecutor is the engine; systematic efforts for professional investigations and effective cooperation are the fuel of the entire Court!*<sup>546</sup>

#### 3.1 INTRODUCTION

The preceding chapter of this thesis gave an account of the marginalisation of crimes of sexual and gender-based violence (SGBV) in international treaties and before certain international tribunals although there was ample evidence that these crimes had been committed. The successful campaign to include crimes such as rape, forced pregnancy and sexual slavery in the Rome Statute by feminists and non-governmental organisations (NGOs)<sup>547</sup> have raised these crimes to a level with those recognised as the ‘most serious crimes of concern to the international community’.<sup>548</sup>

The Rome Statute specifically refers to the ‘effective investigation and prosecution’ of sexual and gender-based crimes (SGBCs) within the International Criminal Court’s (ICC’s) jurisdiction.<sup>549</sup> A careful analysis of SGBV-related crimes that occurred in an armed conflict context and brought before the ICC shows that it is not enough to have these crimes included in the Rome Statute as crimes in their own right, as this alone does not guarantee their successful prosecution. The steps taken by the Prosecutor, right from the preliminary examination stage to

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<sup>546</sup> Hans-Peter Kaul ‘The International Criminal Court – Current challenges and perspectives’ (2011) *Salzburg Law School on International Criminal Law* at 1.

<sup>547</sup> Valerie Oosterveld ‘The definition of “Gender” in the Rome Statute of the International Criminal Court: A step forward or back for international criminal justice?’ (2005) 18 *Harvard Human Rights Journal* 55 at 56-66 (an account of the negotiations involved in getting the word ‘gender’ included in the statute and the opposition faced. Oosterveld played an active part in the negotiation of the definition of ‘gender’). Brook Sari Mosham ‘Women, war and words: The gender component in the Permanent International Criminal Courts definition of crimes against humanity’ (1998) 22 *Fordham International Law Journal* 154 at 171 (stating that ‘gender issues framed some of the most fiercely contested debates at the PrepCom Sessions and the Rome Conference.’)

<sup>548</sup> Rome Statute to the International Criminal Court, preamble, UN Doc A/CONF 183/9, 17 July 1998, 2187 UNTS 90, 37 ILM 1002 1030.

<sup>549</sup> Rome Statute, art 54(1)(b) provides that the Prosecutor shall take ‘measures to ensure the effective investigation and prosecution’ of crimes within its jurisdiction, and respect the interests of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.’ Articles 21(3), 42(9) and 68(1) of the Rome Statute also relate to issues, investigation and prosecution of SGBCs.

the investigation of crimes, plays an important part in the selection of cases for trial.<sup>550</sup> These steps also play a key role in the successful prosecution of SGBVs at trial. The Prosecutor also has to be highly selective about which types of case to prosecute on account of insufficient resources to try all cases before the ICC; an increase in caseload could result in the non-prosecution of SGBV crimes. The Office of the Prosecutor's (OTP) current strategic plan for the number of cases it will handle also gives an insight as to how many cases the ICC will actually handle. Its forecast for 2016-2018 are nine preliminary examinations, one new situation under investigation, six active investigations, nine hibernated investigations, five pre-trial phase cases, five-trial phase cases and two final appeals.<sup>551</sup> Although, the prosecution of SGBVs is currently not affected, it is possible that as the ICC's caseload increases the Prosecutor will have to select for trial only cases of serious concern. In particular, as stated by the Prosecutor in referring to the Appeals Court decision acquitting Bemba of charges, which included rape: '[t]he level of detail that the Prosecution may now be required to include in the charges may render it difficult to prosecute future cases entailing extensive campaigns of victimisation'.<sup>552</sup> This she stated might apply 'where the accused is not a direct perpetrator, but a commander remote from the scene of the alleged crimes but who may bear criminal responsibility as the superior having effective control over the perpetrators, his subordinates'.<sup>553</sup> Apart from this, the ICC is a court of last resort; created as a small organisation that investigates and prosecutes a limited number of cases.<sup>554</sup> Therefore, SGBV-related cases could be marginalised if the Prosecutor has to choose from a large caseload, especially since the duty to investigate and prosecute cases is primarily that of states.

With this in mind, this chapter examines the Prosecutor's discretionary powers and their application in admitting situations and cases of SGBV committed in an armed conflict situation to the ICC. This will provide the foundation for chapter 4, which examines the difficulties

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<sup>550</sup> Women's Initiative for Gender Justice (2012) 'Gender report card on the International Criminal Court' (stating that 'charges for gender-based crimes, when they have been brought have been particularly susceptible to being dropped, or in the same instances recharacterised in the early stages of proceedings, in particular [in] seeking the issuance of an arrest warrant or summons to appears, and the confirmation of charges phase'.)

<sup>551</sup> ICC-OTP, Strategic Plan| 2016-2018, 6 July 2015 at 24 available at [https://www.icc-cpi.int/.../070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/.../070715-OTP_Strategic_Plan_2016-2018.pdf) (accessed 11 November 2016).

<sup>552</sup> Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo available at <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat> (accessed 20 July 2018).

<sup>553</sup> *Ibid.*

<sup>554</sup> Alex Whiting 'Dynamic investigative practice at the International Criminal Court' (2013) 76 *Law and Contemporary Problems* 163 at 176.

encountered at the ICC in obtaining a conviction for SGBCs, despite the inclusion of these crimes in the Rome Statute. The Rome Statute, the policies and strategies adopted by the ICC and those instances where the Prosecutor's decisions affected the admissibility of situations and cases relating to SGBCs are considered. Although scholars have written about the Prosecutor's discretionary powers, their focus has been on the political interference in the discretionary role and the determination of 'gravity' relating to situations and cases.<sup>555</sup> This chapter differs from such writings; as mentioned above, it examines the application of the Prosecutor's discretionary powers to situations and cases before the ICC in the context of SGBCs committed in armed conflict situations.

### **3.2 THE PROSECUTOR'S DISCRETIONARY POWERS IN BRINGING A CASE BEFORE THE INTERNATIONAL CRIMINAL COURT.**

For a clear understanding of the discretionary powers of the Prosecutor in selecting situations and cases to be prosecuted before the ICC, this section first examines the legal framework of the procedure that the Prosecutor must follow in exercising her discretionary powers under the Rome Statute.<sup>556</sup> The examination reveals that the Rome Statute's provisions do not distinguish how the Prosecutor should apply her discretionary powers in the case of SGBCs as opposed to other crimes within the ICC's jurisdiction. However, there appears to be evidence of a distinction in the way the Prosecutor exercises discretionary powers in the selection of SGBCs on the one hand and other crimes for trial. The section commences by differentiating between a situation and a case, which the Rome Statute and its Rules of Procedure and Evidence (RPE) refer to as the discretionary powers of the Prosecutor.

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<sup>555</sup> William A Schabas 'Victor's justice: Selecting situations at the International Criminal Court' (2009 – 2010) 43 *John Marshall Law Review* at 535. Margaret M deGuzman 'Gravity and the legitimacy of the International Criminal Court' (2008 – 2009) 32 *Fordham International Law Journal* at 1400. Margaret M deGuzman 'Choosing to prosecute: Expressive selection at the International Criminal Court' (2011 -2012) 33 *Michigan Journal of International Law* at 265.

<sup>556</sup> As the current Chief Prosecutor Fatou Bensouda is female, reference to the Prosecutor will be in the feminine context, except when referring to the previous Prosecutor Luis Moreno-Ocampo. Ms Bensouda was elected Prosecutor of the ICC on December 12, 2011, and sworn in on June 15, 2012. She holds her office for a term of nine years, which is not renewable. Fatou Bensouda 'Reflections from the International Criminal Court Prosecutor' (2012) 45 *Case Western Reserve Journal of International Law* at 505.

### 3.2.1 Distinguishing between Situations and Cases.

Although the Rome Statute and its RPE refer to situations and cases, these two words are not defined in their provisions.<sup>557</sup> The distinction between these two words has been for ICC judges to determine. It is therefore necessary to have a clear understanding of their meaning as different legal implications flow from their selection. Pre-Trial Chamber I in its decision relating to victim participation gave the distinction between situations and cases. The Chamber stated that:

Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002 entails the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.<sup>558</sup>

Thus, a situation defines the parameters that the Prosecutor uses in determining whether to commence an investigation during the preliminary examination and investigation stage, based on grounds of reasonableness.<sup>559</sup> At this stage, it is not a case in the strict sense of the word as only a hypothesis may be built, premised on the Prosecutor's findings.<sup>560</sup> This is because at this point the Prosecutor does not yet know what her evidence will be, the person or persons she will charge and for what crimes.<sup>561</sup> A case, on the other hand is concrete, in that the Prosecutor has defined the crime to be charged and the alleged perpetrator.<sup>562</sup> A case commences when the Prosecutor requests that the Pre-Trial Chamber issues a warrant of arrest or summons to appear,<sup>563</sup> or when she brings charges against a person, confirmed by the Pre-Trial Chambers

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<sup>557</sup> Phillippe Kirsch and Darryl Robinson Referral by state parties in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court* Vol. I (2002) 619 at 625. Rod Rastan 'What is a 'case' for the purpose of the Rome Statute' (2008) 19 *Criminal Law Forum* at 435.

<sup>558</sup> *Situation in the Democratic Republic of The Congo* 'Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04, para 65. Hector Olasolo and Enrique Carnero-Roto 'The application of the principle of complementarity to the decision of where to open an investigation: The admissibility of 'situations'' in Carsten Stahn and Mohamed M ELZeidy (eds) *The International Criminal Court and Complementarity* Vol. I (2011) at 397. Rastan 'What is a 'case' at 435.

<sup>559</sup> Rastan 'What is a 'case' at 435. Olasolo and Carnero-Roto 'The application of the principle of complementarity' at 402.

<sup>560</sup> *Ibid.* (Rastan refers to this as a 'case hypothesis'). William W Burke-White and Scott Kaplan 'Shaping the contours of domestic justice, The International Criminal Court and an admissibility challenge in the Uganda situation' (2009) 7 *Journal of International Criminal Justice* 257 at 260 (the writers use a different terminology from Rastan and refer to this as 'an investigative hypothesis').

<sup>561</sup> *Ibid.* Olasolo and Carnero-Roto 'The application of the principle of complementarity' at 405.

<sup>562</sup> Rod Rastan 'Situation and case: Defining the parameters' in Carsten Stahn and Mohamed M EL Zeidy (eds) *The International Criminal Court and Complementarity* Vol. I (2011) at 437.

<sup>563</sup> This is according to article 58 of the Rome Statute.

under article 61 of the Statute.<sup>564</sup> Compared to a ‘situation’, a ‘case’ triggers the possibility of a challenge of jurisdiction or admissibility under article 19 of the Rome Statute. Notably, once a trial has commenced, a challenge against the admissibility of a case brought under articles 17(1)(a) and (b) of the Rome Statute cannot be made by a state or any person referred to under the Statute’s article 19(2).<sup>565</sup>

### 3.2.2 Triggering the International Criminal Court’s Jurisdiction: The Preliminary Examination of a Situation.

The preliminary examination of a ‘situation’ is the first stage that the Prosecutor conducts regarding potential cases that fall within the jurisdiction of the ICC. During this stage of the proceeding, the Prosecutor does not have full investigative powers, but carries out a preliminary examination to determine if a reasonable basis exists to open an investigation into the crimes that fall under its jurisdiction and the persons to charge.<sup>566</sup> The Office of the Prosecutor (OTP) carries out a preliminary examination of a situation when a state party to the ICC triggers its jurisdiction,<sup>567</sup> or a non-state party to the Rome Statute makes a declaration accepting the ICC’s jurisdiction.<sup>568</sup> The OTP also carries out a preliminary examination of a situation when the Security Council, acting under Chapter VII of the United Nations Charter, refers a situation to the Prosecutor.<sup>569</sup> The Rome Statute also grants the Prosecutor discretionary power to initiate

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<sup>564</sup> *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ‘Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the application by the Government of Kenya Challenging the Admissibility of the case pursuant to article 19(2)(b) of the Statute”’ (30 August 2011) ICC-01/09-02/11 OA, para 39. *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ‘Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute”’ (30 August 2011) ICC-01/09-01/11 OA, para 40. Rastan ‘What is a ‘case’ at 442.

<sup>565</sup> Rome Statute, art 19(2) of the Statute classifies those who may challenge the ICC’s jurisdiction or admissibility of a case under article 17. These are:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
- (c) A State from which acceptance of jurisdiction is required under article 12.

Under article 19(2)(a) a challenge as to admissibility could also include an article 17(1)(d) situation, that is, insufficient gravity, whilst under article 19(2)(b), insufficient gravity is not a basis for inadmissibility. Article 19(10) referring to the admissibility or challenge as to the jurisdiction of the ICC being made prior to or at the commencement of the trial.

<sup>566</sup> ICC-OTP, Policy Paper on Preliminary Examinations (1 November 2013) para 89 available at [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) (accessed on 31 October 2016).

<sup>567</sup> Rome Statute, arts 13(a) and 14(1). Regulations of the Office of the Prosecutor, Regulation 25.

<sup>568</sup> *Idem* art 12(3). *Ibid.*

<sup>569</sup> *Idem* art 13(b). *Ibid.*

investigations *proprio motu*, based on information received or from information collected when acting on her own initiative.<sup>570</sup> With regard to investigations initiated *proprio motu*, the Prosecutor has an obligation to ‘analyse the seriousness of the information received’.<sup>571</sup> In the case of SGBCs, the Prosecutor examines the general context in which these crimes occurred, and together with other crimes alleged to have been committed she may obtain additional information from sources such as ‘state, organs of the United Nations, intergovernmental or non-governmental organisations’, and ‘may receive written or oral testimony at the seat of the Court’.<sup>572</sup> If the Prosecutor concludes ‘there is a reasonable basis to proceed with a [full] investigation’, based on the criteria laid down in article 53(1)(a)-(c) of the Rome Statute, she must obtain judicial authorisation to commence the investigation from the Pre-Trial Chamber.<sup>573</sup> This she does by submitting ‘a request for authorisation of an investigation, together with any supporting material collected’.<sup>574</sup> Such a request is not required from the Pre-Trial Chamber where the Security Council<sup>575</sup> or the state party has made the referral. Thus, though the Prosecutor is independent of the ICC, the Pre-Trial Chamber acts as a check on the decision made by the Prosecutor.<sup>576</sup>

### 3.2.3 Factors taken into Account to Initiate an Investigation.

Article 53 provides the procedural requirements for the Prosecutor to follow for the investigation of a situation and prosecution of a case.<sup>577</sup> This article applies when the ICC’s jurisdiction is triggered by way of a SC referral or that of a state party, and when the Prosecutor exercises her discretion *proprio motu*. In determining whether there is a reasonable basis to proceed with an

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<sup>570</sup> *Idem* arts 13(c) and 15(1), *Ibid*.

<sup>571</sup> *Idem*, art 15(2).

<sup>572</sup> *Ibid*. Article 15(6) of the Rome Statute, refers to the steps taken by the Prosecutor in paragraphs 15(1) and 15(2) as preliminary examination. Though article 15 relates to the Prosecutor initiating an investigation *proprio motu*, Turone concludes that with regard to a preliminary examination, article 15(2) would also apply to information referred to by the Security Council and a State Party to the ICC. Giuliano Turone ‘Powers and duties of the Prosecutor’ in Antonio Cassese, Paola Gaeta, John RWD. Jones (eds) *The Rome Statute of the International Criminal Court: A commentary* Vol. II (2002) 1137 at 1147-1148. ICC, Policy Paper on Sexual and Gender-Based Crimes, June 2014, Investigation para 39 available at [www.icc.cpi.int/.../OTP-Policy-Paperp-on-Sexual-and-Gender-Based-Cri...](http://www.icc.cpi.int/.../OTP-Policy-Paperp-on-Sexual-and-Gender-Based-Cri...) (accessed 25 October 2016).

<sup>573</sup> *Idem* art 15(3). This is usually before three Pre-Trial Chamber Judges. Rome Statute, art 39(2)(b)(iii).

<sup>574</sup> *Ibid*.

<sup>575</sup> Turone ‘Powers and duties of the Prosecutor’ at 1161.

<sup>576</sup> deGuzman ‘Choosing to prosecute’ at 275. Elizabeth B L King ‘Does justice always require prosecution? The International Criminal Court and transitional justice measures’ (2013) 45 *The George Washington International Law Review* 85 at 94-95 and 100.

<sup>577</sup> Articles 54 to 61 of the Rome Statute, also provides procedural requirements for the investigation of a situation and prosecution of a case.

investigation, the Prosecutor must consider whether the crime falls within the court's jurisdiction, the admissibility of the case under article 17 of the Rome Statute and whether the interests of justice justify an investigation being carried out.<sup>578</sup> With regard to the jurisdictional assessment, as previously stated, the Prosecutor must ensure that the crimes fall within the ICC's jurisdiction by being committed on a state party's territory or by a national of the state party.<sup>579</sup> Apart from this, the ICC's jurisdiction would only extend to crimes which occurred after 1 July 2002, the date its Statute came into effect, or the date after which the state acceded to the ICC's jurisdiction. Where SGBCs are genocidal acts, [acts of] crimes against humanity or war crimes, the Prosecutor can exercise jurisdiction over these crimes.<sup>580</sup> Where the Prosecutor is satisfied that the crimes, including SGBCs, are within the ICC's jurisdiction, an admissibility assessment test is applied, in which the Prosecutor applies the provisions of article 17 of the Rome Statute.<sup>581</sup> This article, couched in the negative, not only provides the framework for admissibility of a case before the ICC, but also develops the rules constituting the 'complementarity principle' under which states are expected to investigate and prosecute the most serious crimes of international concern as listed under article 5 of the Rome Statute. States have primacy over such cases, with the ICC being a court of last resort.<sup>582</sup> As a court of last resort, the ICC is only able to investigate and prosecute crimes within its jurisdiction when the exceptions to article 17 of the Statute apply.

The text of article 17(1) provides:

Having regard to paragraph 10 of the preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

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<sup>578</sup> Rome Statute, art 53(1)(a)-(c). In addition, article 15(4) provides that the case should fall within the jurisdiction of the court.

<sup>579</sup> See Chapter 2, Section 2.4. These are the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Article 5 of the Rome Statute: The ICC can exercise its jurisdiction over non-state parties to the ICC, which have lodged a declaration accepting the ICC's jurisdiction. In the case of a Security Council referral of a situation, when acting under Chapter VII of the United Nations Charter, the ICC can exercise its jurisdiction over any territory or national. Rome Statute, arts 12(2), 12(3) and 13(b). Rules of Procedure and Evidence, Rule 44.

<sup>580</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at para 25.

<sup>581</sup> Article 17 not only applies when the Prosecutor decides to initiate an investigation under article 53(1), but also where the Prosecutor seeks authorisation to initiate investigations *proprio motu* under article 15, and also where she has to decide whether to proceed with a prosecution under article 53(2). *Prosecutor v Francis Kirimi Muthaura et al* 'Judgment on the appeal of the Republic of Kenya' at para 37. Article 17 is also applicable to admissibility determination of concrete cases brought under article 19 of the Rome Statute.

<sup>582</sup> Rome Statute, art 17.

- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for the conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

Although article 17(1) provides four scenarios in which a case will not be admissible before the ICC, it is only in the first three situations that the complementarity principle is embodied. There are therefore, two main parts to article 17: complementarity under sub-paragraphs (a) to (c) and the ‘sufficient gravity’ principle under sub-paragraph (d).<sup>583</sup> Under paragraphs (a) to (c), the Prosecutor must consider whether genuine proceedings or relevant national proceeding exist or existed.<sup>584</sup> Barriers to genuine proceedings by the state concerned are considered. With regard to SGBCs, these include the lack of protective measures for victims, inadequate steps undertaken in the investigation and prosecution of these crimes, and ‘discriminatory<sup>585</sup> attitudes and gender stereotypes in substantive law’.<sup>586</sup> Given that the Prosecutor’s determination at this stage is case specific, the Prosecutor must examine ‘whether the national proceedings encompass the investigation and/or prosecution of the same person(s) for the same conduct as that which forms the basis of the preliminary examination.’<sup>587</sup> In assessing the interest of justice the Prosecutor takes into account the gravity of the crime and the interests of victims.<sup>588</sup> The gravity of the crime entails considering the scale, the nature, the manner of commission, and the impact of the crime. In weighing the gravity of the crime in the case of SCBCs, the OTP also considers ‘the multi-faceted character and the resulting suffering, harm, and impact of such acts’ . . .and the ‘specific elements of each offence, such as killings, rapes, and other crimes involving a sexual

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<sup>583</sup> Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya (31 March 2010) ICC-01/09, para 52. *Prosecutor v Francis Kirmi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ‘Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2) (b) of the Statute’ (30 May 2011) ICC-01/09-02/11, paras 43 and 55.

<sup>584</sup> ICC-OTP, Policy Paper on Preliminary Examinations (1 November 2013) at para 47.

<sup>585</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at para 41.

<sup>586</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at para 41.

<sup>587</sup> *Idem* at para 40. *Prosecutor v Francis Kirmi Muthaura et al* ‘Judgment on the appeal of the Republic of Kenya’ at paras 1, 39-41 and 46. *Prosecutor v William Samoei Ruto et al* ‘Judgment on the appeal of the Republic of Kenya’ at paras 1, 40-47 and 47. *Prosecutor v Thomas Lubanga Dyilo* ‘Decision on the Prosecutor’s Application for a warrant of arrest, article 58’ (10 February 2006) ICC-01/04-01/06, para 31 (where Pre-Trial Chamber I developed the concept ‘that it is a condition *sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the ICC’ when the prosecutor sought the issuance of an arrest warrant against Lubanga).

<sup>588</sup> Rome Statute, art 53(2)(a)-(c)



and/or gender element’, are relevant considerations.<sup>589</sup> Article 17(2) spells out the factors, which determine unwillingness, whilst article 17(3) spells out the factors which determine inability. Article 17(2) provides that the court shall consider whether:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC referred to in article 5;
- (b) [t]here has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) [t]he proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which in the circumstances is inconsistent with an intent to bring the person concerned to justice.’<sup>590</sup>

With regard to inability, Article 17(3) provides that:

The Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.<sup>591</sup>

This paragraph, which takes care of those situations where a state’s national judicial system is destroyed, was considered necessary just as was the case in the Rwandan genocide in 1994.<sup>592</sup>

### **3.2.4. Making a Decision on the Preliminary Examination.**

If, having conducted the preliminary examination, the Prosecutor concludes that there is no reasonable basis to initiate an investigation she must inform those who provided her with the information.<sup>593</sup> Where the Prosecutor concludes that there is no reasonable basis to initiate an investigation, because the investigation would not serve the interests of justice, the Prosecutor must inform the Pre-Trial Chamber of her decision.<sup>594</sup> Nonetheless, this does not prevent her from considering the situation afresh where new facts or evidence are provided.<sup>595</sup> The Pre-Trial

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<sup>589</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at paras 44.

<sup>590</sup> *Idem* at art 17(2)

<sup>591</sup> *Idem* at art 17(c)

<sup>592</sup> J T Holmes ‘Complementarity: National courts versus the ICC’ in Antonio Cassese Paola Gaeta John R W D Jones (eds) *The Rome Statute of the International Criminal Court: A commentary* Vol 1 (2002) at 667. Kevin J Heller ‘The shadow side of complementarity, the effect of article 17 of the Rome Statute on national due process’ (2006) 17 *Criminal Law Forum* 255 at 272.

<sup>593</sup> Rome Statute, art 15(6). Turone points out that this article not only applies to investigations *proprio motu* but is also applicable to the Security Council and state party referrals. His argument is based on the fact that since these two entities can request the Pre-Trial Chamber under article 53(3) (a) to review the Prosecutor’s refusal to initiate an investigation, which was referred by them to her, then article 15(6), should equally apply to them in the case of a preliminary examination. Turone ‘Powers and duties of the Prosecutor’ at 1155.

<sup>594</sup> Rome Statute, art 53.

<sup>595</sup> ICC-OTP, Policy Paper on Preliminary Examinations (1 November 2013) at para 91.

Chamber may review this decision,<sup>596</sup> and either affirm the Prosecutor's decision not to investigate or request that the Prosecutor reconsider her decision.

Where the Prosecutor commences a preliminary examination *proprio motu* and determines that there is a reasonable basis to proceed with a full investigation, she must obtain judicial authorisation to commence the investigation from the Pre-Trial Chamber.<sup>597</sup> This does not apply where the Security Council<sup>598</sup> or the state party makes the referral. Based on an examination of the supporting material(s) presented before it, the Pre-Trial Chamber must consider whether there is a reasonable basis to commence investigation, and at the same time evaluate the jurisdictional aspect of the case.<sup>599</sup> The Pre-Trial Chamber therefore applies the same test as that applied by the Prosecutor, which includes an admissibility assessment. In the event that the Pre-Trial Chamber denies the Prosecutor's request to commence an investigation, the Prosecutor may still present a subsequent request based on new facts and evidence.<sup>600</sup> Where the Pre-Trial Chamber authorises the investigation, or where the referral of the situation was by a state and the Prosecutor believes that there is a reasonable basis to initiate an investigation, the Prosecutor must notify all state parties and those states which under normal circumstances would have jurisdiction over the crimes in question.<sup>601</sup> This would not apply were the referral of a situation was made by the Security Council.<sup>602</sup> Notification to states of the Prosecutor's intention to initiate an investigation affords states primacy over national proceedings under its investigation and thereby avoids the same investigation or proceedings being carried out by both the Prosecutor and the state.<sup>603</sup> States have a month to reply to the Prosecutor's notification, and can request that she defers to national investigation where any of the conditions under article 17(1)(a) to (c) apply.<sup>604</sup> In such circumstances, if the Prosecutor wishes to challenge a state's

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<sup>596</sup> Rome Statute, art 53(3)(b)

<sup>597</sup> *Idem* art 15(3). This is usually before three Pre-Trial Chamber Judges. Rome Statute, art 39(2)(b)(iii).

<sup>598</sup> Turone 'Powers and duties of the Prosecutor' at 1161.

<sup>599</sup> Rome Statute, art 15(4). Under rule 55(2) of the RPE, when the Pre-Trial Chamber makes a preliminary admissibility ruling, it 'shall consider the factors in article 17 in deciding whether to authorise an investigation.'

<sup>600</sup> *Idem* art 15(5)

<sup>601</sup> Holmes 'Complementarity: National courts versus the ICC' at 681 (stating that states must be provided with sufficient information to enable them to determine if they are also examining the same situation, Rule 52 RPE).

<sup>602</sup> *Ibid.* Rome Statute, art 18(1). Turone 'Powers and duties of the Prosecutor' at 1142 (where the referral was made by the Security Council under article 13(b), the Prosecutor does not have to notify the Council. This is because all United Nations members would be aware of the resolution, which was adopted under Chapter VII that resulted in the investigation).

<sup>603</sup> *Ibid.*

<sup>604</sup> Rome Statute, art 18(2).

assertion of admissibility, she must apply to the Pre-Trial Chamber for authorisation to investigate.<sup>605</sup> To decide whether to authorise an investigation, the Pre-Trial Chamber must consider whether article 17 would apply when considering the Prosecutor's application and observations made by the state requesting a deferral.<sup>606</sup>

### 3.2.5 From Investigation to Case Stage

At the case selection stage, the OTP considers the same facts as those considered at the preliminary examination stage, applying a more focused test than that previously done.<sup>607</sup>

In its Policy Paper on Sexual and Gender-based Crimes, the OTP states that it will investigate crimes of SGBV concurrently with other crimes that come within its jurisdiction, thereby moving away from the sequential approach of investigating crimes.<sup>608</sup> The OTP previously adopted a sequential approach due to lack of resources. The OTP states that adopting a concurrent approach in its investigation would result in more effective utilisation of its resources and the prosecution of SGBCs would stand a better chance. The concurrent method would also provide enough time to collect and analyse evidence and to identify and select witnesses.<sup>609</sup> Once the Prosecutor has completed an investigation, and identified crimes, which include SGBCs within the ICC's jurisdiction, she must consider whether there is a sufficient basis for prosecution.<sup>610</sup>

The Prosecutor can determine that there is not a sufficient basis to prosecute when:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.<sup>611</sup>

When the Prosecutor makes such a determination based on any of the above grounds, she must inform the Pre-Trial Chamber of her decision.<sup>612</sup> Where a state party or the Security Council

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<sup>605</sup> *Ibid.*

<sup>606</sup> Rules of Procedure and Evidence, Rule 55(2).

<sup>607</sup> ICC-OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, paras 24 - 25 available at [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) (accessed on 7 November 2016).

<sup>608</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes, at para 49. The Policy Paper sets out the OTP's policy relating to SGBC.

<sup>609</sup> *Ibid.*

<sup>610</sup> Rome Statute, art 53(2)

<sup>611</sup> Article 53(2)(a)-(c).

makes the referral, the Prosecutor must also inform them of her decision not to prosecute, and her reasons for reaching such a conclusion.<sup>613</sup> A state party or the Security Council may also request the Pre-Trial Chamber to review the Prosecutor's decision not to prosecute.<sup>614</sup> The Pre-Trial Chamber, on its own initiative, may also review the Prosecutor's decision not to prosecute on the ground that the decision was not in the interest of justice.<sup>615</sup> The Pre-Trial Chamber may confirm the Prosecutor's decision or ask the Prosecutor to reconsider her decision not to prosecute.<sup>616</sup> Where the Prosecutor determines that there is sufficient basis to prosecute, she may apply to the Pre-Trial Chamber for the issue of a warrant of arrest or a summons to appear.<sup>617</sup>

A case would come into existence upon the issuance of a warrant of arrest or a summons to appear by the Pre-Trial Chamber. This may inform the initiation of an article 19 challenge to the ICC's jurisdiction or the cases admissibility. The article places a duty on the ICC to ensure that it has jurisdiction to hear a case brought before it and determine the issue of admissibility of the case pursuant to article 17.<sup>618</sup> An accused or any person issued with a warrant of arrest or summons to appear can also bring a challenge as to jurisdiction or admissibility.<sup>619</sup> A state which has jurisdiction over the case or which accepts the jurisdiction of the ICC as required by article 12 of the Statute may also challenge the ICC on its jurisdiction or admissibility to hear a case.<sup>620</sup> Whilst an accused or person on whom an arrest warrant or summons to appear is served can challenge the admissibility of the case based on insufficient gravity under article 17(1)(d), a state does not have this option. It can only make a challenge on the ground that it is investigating or prosecuting the case or on the ground that it has already investigated or prosecuted the case.<sup>621</sup> A non-state party that has accepted the ICC's jurisdiction can also make a challenge.<sup>622</sup>

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<sup>612</sup> *Ibid.* Rules of Procedure and Evidence, Rule 106 deals with notification of a decision by the Prosecutor not to prosecute under article 53(2).

<sup>613</sup> *Ibid.*

<sup>614</sup> *Idem* art 53(3)(a).

<sup>615</sup> *Idem* art 53(3)(b).

<sup>616</sup> Rules of Procedure and Evidence, Rule 108 and 110.

<sup>617</sup> Rome Statute, art 58

<sup>618</sup> *Idem* art 19(1). Article 19(1) provides that the ICC should be satisfied that it has jurisdiction to hear cases, which comes before it. It also provides for the admissibility of cases before the ICC. It provides that the ICC 'may on its own motion, determine the admissibility of a case in accordance with article 17.'

<sup>619</sup> *Idem* art 19(2)(a).

<sup>620</sup> *Idem* art 19(2)(b).

<sup>621</sup> *Ibid.*

<sup>622</sup> *Idem* art 19(2)(c).

### 3.3 THE APPLICATION OF THE PROSECUTOR'S DISCRETION RELATING TO SEXUAL AND GENDER-BASED CRIMES

The first few situations in which the previous Prosecutor, Luis Moreno-Ocampo, opened investigations contained crimes of SGBV that occurred in armed conflict situations. These were self-referred situations to the Prosecutor by Uganda, the Democratic Republic of Congo (DRC), Central African Republic (CAR) and Mali.<sup>623</sup> These self-referrals were criticised by scholars, who pointed out that self-referrals of situations from states on whose territory such crimes were committed were not anticipated by the drafters of the Rome Statute.<sup>624</sup> The Appeals Chamber in Katanga has however ruled that the Rome Statute permits self-referrals, and that the ICC must be able to investigate and prosecute crimes within its jurisdiction when states fail to do so.<sup>625</sup> Thus, although self-referrals have become part of the ICC's jurisprudence, no other African state has self-referred crimes, which contain SGBV that occurred in an armed conflict situation.<sup>626</sup> The

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<sup>623</sup> The Government of Uganda referred the Ugandan situation to the Office of the Prosecutor (OTP) in December 2003. As Uganda was not a state party to the ICC, it made a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the ICC. The situation in the DRC was referred to the OTP in a letter dated 3 March 2004 by the Government of the DRC. *The Prosecutor v. Thomas Lubanga Dyilo*. 'Decision assigning the Situation in The Democratic Republic of Congo to the Pre-Trial Chamber I' ICC-01/04, 5 July 2004 (where a letter from the Prosecutor dated 17 June 2004 was annexed to this decision making mention of the referral by the DRC and Uganda). The Government of Central African Republic made the first referral to the ICC regarding situations in Central African Republic in December 2004. Its transitional government made a second referral on 30 May 2014 referring the situation in its territory since 1 August 2012. OTP, Situation in the Central African Republic II, Article 53(1) Report, 24 September 2014 available at [https://www.icc-cpi.int/iccdocs/otp/Art\\_53\\_1\\_Report\\_CAR\\_II\\_24Sep14.pdf](https://www.icc-cpi.int/iccdocs/otp/Art_53_1_Report_CAR_II_24Sep14.pdf) (accessed on 31 October 2016). The situation occurring in Mali going back to January 2012 was referred by its government to the OTP on 18 July 2012, in a letter dated 13 July 2012 to the OTP. Presidency, Decision assigning the situation in the Republic of Mali to Pre-Trial Chamber II (19 July 2012) ICC-01/12.

<sup>624</sup> Paola Gaeta 'Is the practice of "self-referrals" a sound start for the ICC' (2004) 2 *Journal of International Criminal Justice* at 949- 952. Burke-White and Kaplan 'Shaping the contours of domestic justice' at 259. Darryl however argues that the records of the ICC's drafting history show the opposite. Darryl Robinson 'The controversy over territorial state referrals and reflections on the ICL discourse.' (2011) 9 *Journal of International Criminal Justice* at 355-384.

<sup>625</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* 'Judgment on the appeal of Mr Germain Katanga against the oral decision of Trial Chamber II of 12 June 2009 on the admissibility of the case' (25 September 2009) ICC-01/04-01/07 OA 8, para 85 (stating that 'the Appeals Chamber is not persuaded by the argument of the Appellant that it would be to negate the obligation of States to prosecute crimes if they were allowed to relinquish domestic jurisdiction in favour of the International Criminal Court'). *Prosecutor v Jean-Pierre Bemba Gombo* 'Decision on the admissibility and abuse of process challenges' (24 June 2010) ICC-01/05-01/08, para 259 referring to the Appeals Chamber ruling on self-referrals. Trial Chamber III also stated that '[i]n any event, the Appeals Chamber, in the context of describing the balance between the complementarity principle and the goal of ending impunity, has cautioned against inappropriately deterring States from relinquishing jurisdiction in favour of the Court'.

<sup>626</sup> Situations have also been referred to the ICC by way of a Security Council referral, such as situations from Darfur, Sudan and Libya. These states are not parties to the Rome Statute. The Darfur, Sudan situation relates to an armed conflict involving crimes of sexual violence, whilst that in Libya relates to alleged crimes against humanity, which were committed in Libya from 15 February 2011 to 28 February 2001. The Security Council referred the

Prosecutor also adopted a policy of inviting states to self-refer situations to the ICC ‘to increase the likelihood of important cooperation and support on the ground’.<sup>627</sup> Regardless of the method used to trigger the ICC’s jurisdiction, the Prosecutor applies the same criteria and standards relating to all preliminary examination activities.<sup>628</sup>

In applying his discretionary power in investigating of these situations, and having formed an opinion as to whom to prosecute, and what crimes to charge, the Prosecutor has made choices that have hindered the effective prosecution of SGBCs. In this section, these choices are considered.

### 3.3.1 Avoiding Prosecuting Sexual and Gender-based Crimes.

The *Thomas Lubanga Dyilo* case was the first that the Prosecutor brought before the ICC. Lubanga was the President of the *Union des Patriotes Congolais/Réconciliation et Paix* (UPC/RP), a group that committed various atrocities, including SGBCs in Ituri, situated in the north-eastern part of the DRC. A letter addressed to the President of the Security Council from the Secretary-General confirms that this group committed crimes of sexual and gender-based violence:

UPC forces shelled hundreds of Lendu villages without making any distinction between armed combatants and civilians. Some villages in Djugu territory were the object of repeated attacks when the inhabitants returned and rebuilt during calmer periods. Each time that they took control of Bunia — August 2002 and May 2003 — UPC forces conducted a manhunt for Lendu, Bira, Nande and non-Iturians whom they considered opponents: many persons were killed and many

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situation in Darfur, Sudan to the ICC on 31 March 2005, under Resolution 1593 (2005). Cases and Situations Darfur, available at <http://www.iccnw.org/?mod=darfur> (accessed 31 October 2016). The situation in Libya was referred by the Security Council by Resolution 1970 (2011) on 26 February 2011. This was the first time that the Security Council unanimously adopted such a resolution. Libya – Coalition for the International Criminal ICC, available at [www.iccnw.org/?mod=Libya](http://www.iccnw.org/?mod=Libya) (accessed 31 October 2016). All Cases – ICC, available at [www.icc.cpi.int/.../icc/situations%20and%20cases/cases/.../cases%20inde...](http://www.icc.cpi.int/.../icc/situations%20and%20cases/cases/.../cases%20inde...) (accessed 31 October 2016). ICC – Libya, available at [www.icc.cpi.int/.../icc/situations%20and%20cases/.../icc0111/.../situation](http://www.icc.cpi.int/.../icc/situations%20and%20cases/.../icc0111/.../situation) (accessed 31 October 2016).

The Prosecutor has also exercised her *proprio motu* powers in situations in Kenya and Cote d’Ivoire, where the crimes charged, which included rape, occurred during post-election violence. The Kenyan situation occurred between 2007 and 2008 and the Cote d’Ivoire situation between December 2010 and April 2011.

<sup>627</sup> OTP, Report on the activities performed during the first three years (June 2003 – June 2006), 12 September 2006 at 2 available at [https://www.icc-cpi.int/NR/rdonlyres/.../OTP\\_3yearreport20060914\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/.../OTP_3yearreport20060914_English.pdf) (accessed 31 October 2016). ICC – The Office of the Prosecutor of the International Criminal Court opens its first investigation, 23 June 2004 available at [www.icc-cpi.int/.../item.aspx?...office...prosecutor...court+opens+its+first+investigatio..](http://www.icc-cpi.int/.../item.aspx?...office...prosecutor...court+opens+its+first+investigatio..) (accessed 31 October 2016).

<sup>628</sup> ICC-OTP, Policy Paper on Preliminary Examinations (1 November 2013) Executive summary at paras 12 and para 35.

others disappeared or chose to leave Bunia. UPC soldiers also committed large-scale rape in the different areas of the town, sometimes abusing girls as young as 12.

The team received reports of 18 cases of rape, some of the victims being as young as 11, committed by UPC soldiers after the ceasefire was signed. Most of the victims were abducted while they were out to look for food or water, and were taken to military places or private houses for sexual abuse.

During those two periods, the MLC and RCD-N forces, although under different command, committed serious human rights abuses such as summary executions, systematic rape, systematic looting and acts of cannibalism. After Mambasa, similar abuses were also systematically carried out in the villages south of the town and between Komanda and Eringeti, with the involvement of UPC. The number of rape cases — mainly young girls or women between 12 and 25 years old — also rose to an alarming level.<sup>629</sup>

Although there was evidence that the UPC had committed SGBCs, the Prosecutor chose to charge its President, Lubanga solely with the crime of conscripting, enlisting and using child soldiers under the age of 15 to participate actively in hostilities, without establishing whether SGBCs could be linked to Lubanga.<sup>630</sup>

Luis Moreno-Ocampo's initial reason for charging Lubanga solely with the crime of conscripting, enlisting and using child soldiers was to avoid a 'possibly imminent release' from the DRC's custody. Lubanga had been in the custody of the DRC authority for nearly a year before his transfer to the ICC.<sup>631</sup> Interviews given by ex-prosecution investigators, however, state otherwise. After a year and a half of probing Lubanga, these investigators were instructed to 'focus solely on the use of child soldiers', although they had also found evidence of rape, enslavement, torture and pillage.<sup>632</sup> The investigators suggested that the reason for such instruction was that the investigations were taking too long and that prosecutors were under pressure to start cases.<sup>633</sup> Luis Moreno-Ocampo had notably stated that he was prepared to add further charges if there was sufficient information and evidence to do so.<sup>634</sup> The letter from the

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<sup>629</sup> Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council: Special report of the events in Ituri January 2002 to December 2003, UN Doc. S/2004/573 (16 July 2007), paras 37, 80 and 108 available at [https://digitallibrary.un.org/record/527418/files/S\\_2004\\_573-EN.pdf](https://digitallibrary.un.org/record/527418/files/S_2004_573-EN.pdf) (accessed 14 July 2018),

<sup>630</sup> *Prosecutor v Thomas Lubanga Dyilo* 'warrant of arrest' (10 February 2006) ICC-01/04-01/06.

<sup>631</sup> OTP, Report on activities performed during the first three years at 8 and 12. James A Goldston 'More candour about criteria, the exercise of discretion by the Prosecutor of the International Criminal Court' (2010) 8 *Journal of International Criminal Justice* 383 at 394.

<sup>632</sup> Katy Glassborow 'Special Report: Sexual violence in DRC, ICC investigative strategy under fire' available at <https://iwpr.net/global-voices/icc-investigative-strategy-under-fire> (accessed 31 July 2018).

<sup>633</sup> *Ibid.*

<sup>634</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Prosecutor's information on further information' (28 June 2006) ICC-01/04-01/06, para 2. FIDH 'The Office of the Prosecutor of the International Criminal Court nine years on: Analysis of the prosecutorial strategy and policies of the Office of the Prosecutor (2003 -2011) recommendations to the next

Secretary General, which was based on a report from the United Nations Organisation Mission in the DRC, contained sufficient evidence for a preliminary examination into these crimes to have concluded that the UPC, of which Lubanga was President, carried out SGBCs. The Prosecutor would then have been able to establish whether there was sufficient evidence which linked Lubanga to the crimes committed by the UPC. Other statements from the Prosecutor did not revolve round the prosecution not being able to obtain sufficient evidence to prosecute Lubanga for SGBCs. When the Prosecutor later stated he was willing to investigate crimes other than what was charged, these crimes did not include SGBCs committed in armed conflict, but ‘allegations related to the intentional direction of attacks against the civilian population, murders committed during and after these attacks, the pillaging of towns and places, and ordering the displacement of the civilian population’.<sup>635</sup> This shows that SGBCs continued to be marginalised, even though there was evidence that may have linked Lubanga to SGBCs. The Prosecutor also informed the ICC that he was not going to bring further charges against Lubanga, as amending the charges would add to the difficulties of providing adequate protection for the victims and witnesses. In addition to this, the Prosecutor stated that it would delay the proceedings, thereby prejudicing the right of Lubanga to be heard without further delay.<sup>636</sup> The Prosecutor at a much later stage stated that he did not bring any charges for SGBV due to the small scale of the pre-trial investigations, the insufficient evidence, and the opportunistic nature of the crimes.<sup>637</sup> It appears that the OTP was focused on the likelihood of success in prosecuting Lubanga for enlisting and conscripting children, despite the wealth of evidence that the UPC committed SGBCs. The ICC’s then Deputy Prosecutor, Fatou Bensouda, stated that the child soldiers’ case against Lubanga was a very strong one, and that they were comfortable with the evidence on this charge.<sup>638</sup> As will be observed in chapter 4, although the Prosecutor had many opportunities to amend the charges to include SGBCs in proceedings before the ICC, he refused to do so. In its prosecutorial strategy report, the Prosecutor’s office stated that it relied on a focused approach in its investigations and

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International Criminal Prosecutor’ (December 2011) at 11 available at <https://www.fidh.org/IMG/pdf/cpiproc579ang.pdf> (accessed 1 November 2016).

<sup>635</sup> *Prosecutor v Thomas Lubanga Dyilo* ‘Prosecutor’s information on further information’ (28 June 2006) ICC-01/04-01/06, paras 3, 7 and 9.

<sup>636</sup> *Idem*.

<sup>637</sup> Redated version of confidential letter submitted to the Office of the Prosecutor, written by Brigid Inder to Luis Moreno Ocampo. See also interview, the ICC’s deputy Prosecutor, Fatou Bensouda, Interview with Fatou Bensouda, ICC Deputy Prosecutor (2009) available at [www.ijmonitor.org/.../interview-with-fatou-bensouda-icc-deputy-prosec...](http://www.ijmonitor.org/.../interview-with-fatou-bensouda-icc-deputy-prosec...) (accessed 10 March 2016).

<sup>638</sup> Interview, the ICC’s deputy Prosecutor, Fatou Bensouda, *Ibid*,



prosecutions. By this, it ‘adopted a policy of focusing its efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes.’<sup>639</sup> The aim of the focused approach was ‘to carry out short investigations and propose expeditious trials while aiming to represent the entire range of criminality. In principle, incidents will be selected to provide a sample that is reflective of the gravest incident and the main types of victimisation’.<sup>640</sup> Adopting a focused approach in the *Lubanga* case resulted in the non-prosecution of SGBCs. However, just as crimes of conscripting, enlisting and using child soldiers come within the class of crimes which are the ‘most serious crimes of concern to the international community’,<sup>641</sup> so also are crimes of SGBV. The crime of conscripting, enlisting and using child soldiers, as a ‘sample’, was not representative of the SGBV crimes by Lubanga as the leader of the UPC and his troops; neither did they represent the harm committed to victims of SGBV.<sup>642</sup>

The Prosecutor, made a choice similar to that in the *Luganda* case in the case against Bosco Ntaganda, by narrowing the charges against Ntaganda when he applied for an arrest warrant. Ntaganda was initially charged with conscripting, enlisting and using child soldiers under the age of 15 to participate in hostilities.<sup>643</sup> A second warrant of arrest, issued six years later contained charges of rape and sexual slavery as war crimes and crimes against humanity.<sup>644</sup>

In the case against Dominic Ongwen, the commander of a rebel group known as the Lord’s Resistance Army (LRA) in Uganda, the Prosecutor brought 70 counts of war crimes and crimes against humanity, against him.<sup>645</sup> Eighteen of these counts were crimes related to SGBV, such as forced marriage, rape and sexual slavery, thus indicating the current Prosecutor’s willingness to charge SGBCs where evidence of these crimes exists. The move away from bringing charges within a narrow scope is proof that the current Prosecutor is fulfilling her aim ‘to represent as much as possible the true extent of the criminality which has occurred within a

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<sup>639</sup> OTP, Report on Prosecutorial Strategy (14 September 2006) at 5 – 6, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2006> (accessed 1 November 2016). Prosecutorial Strategy 2009-2012 (1 February 2010) at 6 available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2010> (accessed 1 November 2016). OTP, Report on activities performed during the first three years at 7.

<sup>640</sup> *Ibid.* *Ibid.* *Ibid.*

<sup>641</sup> Rome Statute, preamble and art 5(1).

<sup>642</sup> FIDH ‘Statement on the Prosecutorial Strategy of the Office of the Prosecutor of the International Criminal Court, 26 September 2006’ available at <https://www.fidh.org/> (accessed 1 November 2016).

<sup>643</sup> *Prosecutor v Bosco Ntaganda* ‘warrant of arrest’ (22 August 2006) ICC-01/04-02/06. FIDH ‘The Office of the Prosecutor of the International Criminal Court nine years on’ at 12.

<sup>644</sup> *Prosecutor v Bosco Ntaganda* ‘Decision on the Prosecutor’s application under article 58’ (13 July 2012) ICC-01/04-02/06, para 5.

<sup>645</sup> Situation in Uganda ‘Warrant of arrest for Dominic Ongwen’ (8 July 2005) ICC-02/04, para 10.

given situation, in an effort to ensure . . . that the most serious crimes committed in each situation [do] not go unpunished'.<sup>646</sup> It is also proof that her office is taking into consideration 'crimes that have been traditionally under-prosecuted, such as . . . rape and other sexual and gender-based crimes'.<sup>647</sup>

### **3.3.2 Lack of Proper Investigation of Crimes Relating to SGBV.**

The focused approach adopted by the Prosecutor in carrying out expeditious and short investigations resulted in insufficient investigations of SGBVs, as reflected in cases of *Germain Katanga* and *Mathieu Ngudjolo*.<sup>648</sup> Ex-employees of the ICC confirmed the flawed approach used by the ICC before and during its investigations of crimes relating to SGBV, which resulted in their non-prosecution.<sup>649</sup> Two identified factors in the non-prosecution of SGBVs were complexity and difficulty of proof. In addition, insufficient resources needed to prove all crimes before the ICC meant that only a few selected crimes could be thoroughly investigated.<sup>650</sup> Although the ICC applied a focused approach to all crimes, SGBVs were not given the priority afforded to other crimes. This was reflected, for example, in the *Germain Katanga* and *Mathieu Ngudjolo* trials.<sup>651</sup>

### **3.3.3 Risk of Sexual and Gender-based Violence Charges being withdrawn where Evidence Supporting the Charges is Limited.**

In adopting a focused approach of short investigations and expeditious trials in its selection process relating to incidents and charges, the Prosecutor called few witness to testify. This was also intended to cope with security challenges.<sup>652</sup> However, the risk of having a limited number as witnesses to testify on a particular charge meant that if the court refused to accept their statements the charge fell to be removed.<sup>653</sup> This is what happened in the cases against Katanga

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<sup>646</sup> ICC-OTP, Policy Paper on Case Selection and Prioritisation at para 45. International Bar Association 'Evidence matters in ICC trials' (August 2016) at 13 available at [www.ibanet.org/Document/Default.aspx?DocumentUid=864b7fc6-0e93-4b2b..](http://www.ibanet.org/Document/Default.aspx?DocumentUid=864b7fc6-0e93-4b2b..) (accessed 1 November 2016).

<sup>647</sup> *Idem* at para 46.*Ibid.*

<sup>648</sup> See for example chapter 4, section 4.2.2.2.

<sup>649</sup> Katy Glassborow 'ICC investigative strategy under fire'.

<sup>650</sup> *Ibid.*

<sup>651</sup> See Chapter 4.

<sup>652</sup> OTP, Report on Prosecutorial Strategy at 5. Prosecutorial Strategy 2009-2012 at 6. OTP, Report on activities performed during the first three years at 8.

<sup>653</sup> Susana Sacouto and Katherine Cleary 'The importance of effective investigation of sexual violence and gender-based crimes at the International Criminal Court' (2009) 17 *American University Journal of Gender, Social Policy and the Law* 337 at 342. Susana Sacouto 'International law weekend, American Branch of the International Law

and Ngudjulo, where the Pre-Trial Chamber did not allow the admission of two witnesses' statements from the Prosecutor to support the charges relating to sexual slavery as a war crime and crime against humanity.<sup>654</sup> The ICC judges excluded the statements due to concern about the witnesses' security. Article 68 of the Rome Statute provides that all organs of the ICC 'shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.<sup>655</sup> In the result, the Prosecutor had to drop the charges brought against Katanga and Ngudjulo. Only when the court's witness protection programme was in place and accepted by the judges with respect to the witnesses, was the Prosecutor able to reintroduce these charges, as well as bring additional charges of rape and outrage upon personal dignity.<sup>656</sup>

To ensure the protection and support of witnesses as well as their families, the OTP has set up a Protection Strategies Unit (PSU) and an Operations Support Unit (OSU). These units also protect and support those at risk for having dealings with the OTP.<sup>657</sup> In working with the Victims Witness Unit (VWU),<sup>658</sup> the OTP, especially its PSU, 'will cooperate with the VWU on matters of protection and support, including . . . sharing any relevant information, and providing any assistance in the implementation of protective measures and support where necessary and appropriate'.<sup>659</sup> The Policy Paper on Sexual and Gender-based Crimes goes on to state that the OTP 'is mindful of the need for timely intervention, and will facilitate the provision of the required assistance where necessary to maintain the physical and psychological welfare of

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Association Perspectives on crimes of sexual violence in international law' (2012 – 2013) 19 *ILSA Journal of International & Comparative Law* 263 at 270 – 271.

<sup>654</sup> *Ibid. Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* 'Decision on evidentiary scope of the confirmation hearing preventive relocation and disclosure under article 67(2) of the Statute and Rule 77 of the Rules' (25 April 2008) ICC-01/04-01/07, para 39.

<sup>655</sup> Rome Statute, article 68(1). The full text of article 68(1) provides that:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3 and health, and the nature of crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures, particularly during the investigation and prosecution of such crimes. The measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

<sup>656</sup> *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* 'Decision on Prosecution's urgent application for the admission of the evidence of witnesses 132 and 287' (28 May 2008) ICC-01/04-01/07 at 6-7. Sacouto and Cleary 'The importance of effective investigation' at 342. Sacouto 'International law weekend' at 270 – 271.

<sup>657</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at para 85.

<sup>658</sup> *Idem* at para 86. The VWU is the unit of the Registry at the ICC, which is 'primarily responsible for the provision of protective measures, counselling, and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.'

<sup>659</sup> *Ibid.*

witnesses, particularly victims of sexual and gender-based crimes. The Office will also work with states and other relevant actors in order to give full effect to this provision'.<sup>660</sup>

### 3.3.4 Impartiality

The OTP in its early years stated that it would focus its investigations and prosecutions on 'the most serious crimes and on those who bear the greatest responsibility for these crimes'.<sup>661</sup> It therefore sets out to target people in high positions who had ordered, financed or organised crimes alleged to have been committed.<sup>662</sup> In addition, its policy papers stated that general principles on preliminary examinations, case selections and their prioritisation (carefully packaged) were based on 'the overarching principles of independence, impartiality and objectivity'.<sup>663</sup> The previous ICC Prosecutor, Luis Moreno-Ocampo, was accused of being biased and impartial as he only targeted rebel groups in the DRC, Uganda and the CAR conflicts, thereby failing to apply the aims of the OTP on whom to investigate and prosecute.<sup>664</sup> In endorsing the Prosecutor's alleged bias and impartiality in the DRC, Human Rights Watch, for example, stated that:

Key political and military figures in Kinshasa, as well as in Uganda and Rwanda also played a prominent role in creating, supporting and arming Lubanga's *Union of Congolese Patriots*, Katanga's *Nationalist and Integrationist Front*, and Ngudjolo's *Ituri Patriotic Resistance Forces*.

The availability of political and military support from these external actors encouraged local leaders in Ituri to form more structured movements and significantly increased their military strength. We therefore urge the Prosecutor to investigate senior officials in Kinshasa, Kampala and Kigoli and, evidence permitting, to bring cases against them.<sup>665</sup>

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<sup>660</sup> *Ibid.*

<sup>661</sup> Prosecutorial Strategy 2009-2012 at 5- 6. OTP, Report on Prosecutorial Strategy at 5.

<sup>662</sup> *Idem* at 6.

<sup>663</sup> ICC-OTP, Policy Paper on Preliminary Examinations (1 November 2013) at para 25. ICC-OTP, Policy Paper on Case Selection and Prioritisation at para 16.

<sup>664</sup> William W Burke-White 'Complementarity in practice: The International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 557 at 559, 563- 568 (stating that 'the existence of the ICC has offered a politically expedient solution for the Congolese president to deal with potential electoral rivals, resulting in the somewhat surprising referral of the situation to the Court by the Congolese government itself'). William A Schabas 'Prosecutorial discretion v judicial activism' (2008) 6 *Journal of International Criminal Justice* 731 at 752-753.

<sup>665</sup> Human Rights Watch 'Courting history: The landmark International Criminal Court's first years' at 60-61 available at <https://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf> (accessed 1 November 2016).

The Prosecutor defended his actions in the Ugandan situation by saying that he based the decision on whom to prosecute on the gravity criteria.<sup>666</sup> This included an assessment from ‘a quantitative and qualitative viewpoint and factors such as the scale, nature and manner of commission of the crimes, and their impact on victims’.<sup>667</sup> In applying the gravity criteria, the Prosecutor concluded that the alleged crimes committed by the LRA were of a higher gravity than those committed by the Ugandan People’s Defence Force (UPDF), and other groups,<sup>668</sup> thus indicating that the alleged SGBCs committed by the UPDF and other groups were not serious enough to prosecute, even though various international bodies had brought to light the gravity of these crimes. A 2005 report by Human Rights Watch, for instance, confirms that the UPDF were equally to blame for SGBCs committed in Uganda. It states that ‘soldiers and officers of the Ugandan army, which is deployed in or near every displaced persons camp in northern Uganda, engaged in abuses in 2005, beating, raping and even killing civilians with near total impunity’.<sup>669</sup> These civilians obviously trusted the government to protect them. Scholars have also criticised the ICC for only prosecuting the LRA as a political move.<sup>670</sup> In the DRC and CAR situations, the Prosecutor should have also applied the gravity criteria, given that they were an important factor he was obliged to consider in opening an investigation or selecting cases.<sup>671</sup>

The Prosecutor in policy papers has consistently stated that impartiality

... does not mean ‘equivalence of blame’ between different persons and groups within a situation, or that the Office must necessarily prosecute all sides in order to balance off perceptions of bias; instead it requires the Office to focus its efforts objectively on those most responsible for the most serious crimes within the situation in a consistent manner, irrespective of the States or parties involved or the person(s) or group(s) concerned.<sup>672</sup>

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<sup>666</sup> Luis Moreno-Ocampo ‘Keynote address: Integrating the work of the International Criminal Court into local justice initiatives’ (2005) 21 *American University International Review* 497 at 498. OTP-ICC, Report on the activities performed during the first three years at 8.

<sup>667</sup> ICC-OTP, Policy Paper on Preliminary Examinations (1 November 2013) Executive summary at para 9. ICC-OTP, Policy Paper on Case Selection and Prioritisation at para 31.

<sup>668</sup> Moreno-Ocampo ‘Keynote address’ at 498. OTP-ICC, Report on the activities performed during the first three years at 8.

<sup>669</sup> Human Rights Watch ‘Uganda Events of 2005’ available at <https://www.hrw.org/world-report/2006/country-chapters/uganda> (accessed 14 August 2018).

<sup>670</sup> Adam Branch ‘Uganda’s civil war and the politics of ICC intervention’ 28 *Ethics & International Affairs* 179 (stating that ‘the ICC, in accepting the referral and prosecuting only the Lord’s Resistance Army, has in effect chosen to pursue a politically pragmatic case even though doing so contravenes the interests of peace, justice, and the rule of law’.)

<sup>671</sup> ICC-OTP, Policy Paper on Preliminary Examinations (1 November 2013) at para 66. ICC-OTP, Policy Paper on Case Selection and Prioritisation at para 6.

<sup>672</sup> *Idem* at paras 28 and 66. *Idem* at para 20.

If the OTP had investigated the alleged crimes committed by senior government officials in the DRC and CAR situations it would have found that the SGBCs alleged to have been committed by these senior government officials were serious enough to be prosecuted. With regard to the Ugandan situation, contrary to Luis Moreno-Ocampo's assertion that the crimes committed by the UPDF were not of greater gravity than those committed by the LRA is contradicted by the statement of the OTP that no complaints had been received against the UPDF.<sup>673</sup> The non-prosecution of senior government officials or heads of state shows the difficulty in bringing charges of SGBCs against this set of people, thus creating an impunity gap in the investigation and prosecution of these officials. Uganda and the DRC, for example, were politically motivated in referring of the situations to the ICC, and such referrals helped the Prosecutor in bringing situations before the ICC.<sup>674</sup> Although the Prosecutor could have brought these situations *proprio motu* before the ICC, he would have faced the hurdle of proving that the states in question were 'unable or unwilling genuinely to carry out' domestic proceedings, especially if these states opposed him.<sup>675</sup> The ICC was certain of the cooperation of the Ugandan and the DRC governments by choosing not to investigate or prosecute the governments of these states (which also committed SGBCs) but rather their opponents for crimes committed in their territory.<sup>676</sup>

Gaeta is of the opinion that self-referrals may be the best option in bringing situations before the ICC, compared to the other options for triggering the ICC's jurisdiction.<sup>677</sup> As observed by one of the ICC's former judges, the ICC 'will almost inevitably be caught between

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<sup>673</sup> The Director Jurisdiction Complementarity and Co-operation Division of the ICC, Phakiso Mochochoko, stated in 2015 that the ICC had not received any complaints against the UPDF, regarding the alleged crimes, which have been committed in northern Uganda. Willy Chowoo 'No yet case against UPDF at ICC – Hague' (16 November 2015) available <https://chowoo.wordpress.com/2015/11/16/no-yet-case-against-updf-in-icc-hague/> (accessed 7 November 2016).

<sup>674</sup> Paola Gaeta 'Is the practice of "self-referrals" a sound start for the ICC' at 949-952. Burke-White 'Complementarity in practice' at 563-567. Sarah M H Nouwen and Wouter G Werner 'Doing justice to the political: The International Criminal Court in Uganda and Sudan' (2011) 21 *The European Journal of International Law* at 941-965.

<sup>675</sup> *Ibid* at 950-951.

<sup>676</sup> *Ibid* at 950 and 952. Nouwen and Werner 'Doing justice to the political' at 952-953 and 964.

<sup>677</sup> *Idem* at 951. The case against Al-Bashir, the President of Darfur, Sudan, which was referred to the ICC by the Security Council under article 13(b) of the Rome Statute, is an example of the difficulties, which the ICC is encountering. The ICC has not been able to arrest Al-Bashir as Sudan has refused to arrest him, and also certain state parties to the Rome Statute and non-state parties have refused to cooperate with the ICC in the arrest and surrender of Al-Bashir. Katerina Katsimardon-Mirariti 'ICC Al-Bashir case: New decisions on non-cooperation' (2016) available at <http://blog.casematrixnetwork.org/toolkits/eventsnews/news/icc-al-bashir-case-new-decisions-on-non-cooperation/> (accessed 7 November 2016).

the poles of brutal power politics on the one hand and law and human rights on the other'.<sup>678</sup> If there is to be accountability for crimes of SGBV, the ICC has to make a choice of whom it will investigate and prosecute.

In its recent Policy Paper on Case Selection and Prioritisation, the OTP states that it 'shall apply its methods and criteria equally to all persons without any distinction based on official capacity pursuant to article 27(1) or other grounds referred to in article 21(3)'.<sup>679</sup> Yet, aside from the OTP's statement that it had not received any complaints against the UPDF, the OTP has not investigated alleged crimes against the government forces in the DRC and CAR, based on the purported knowledge that these states prosecute their own government forces. The OTP goes on to state in its policy paper that it would 'not seek to create the appearance of parity within a situation between rival parties by selecting cases that would not otherwise meet the criteria set out' in its paper.<sup>680</sup> This statement indicates that the OTP realises the difficulty in investigating high-placed officials where a state government is unlikely to allow them to investigate crimes allegedly committed on their territory by their officials. As scholars have noted, in the self-referral cases the expectation is that the Prosecutor would not investigate government officials, but those who were against the government.<sup>681</sup> The pertinent question for the Prosecutor is whether he should solely pursue the rebel leaders as the cooperation of states makes a difference as to what evidence he obtains. It also means at least the prosecution of some perpetrators, and victims of the alleged crimes, which include SGBCs, would feel that justice has been done.

### **3.4 RECTIFYING PAST MISTAKES IN THE INVESTIGATION AND PROSECUTION OF SEXUAL AND GENDER-BASED CRIMES**

Since her appointment as the Chief Prosecutor of the ICC in December 2011, Fatou Bensouda has been committed to the investigation and prosecution of SGBCs and enhancing victims' access to justice before the ICC.<sup>682</sup> Under her leadership, the Prosecutor has produced a Policy

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<sup>678</sup> Kaul 'The International Criminal Court (Current challenges and perspectives)' at 9.

<sup>679</sup> ICC-OTP, Policy Paper on Case Selection and Prioritisation at para 19.

<sup>680</sup> *Idem* at para 20.

<sup>681</sup> Jan Wouters and Kenneth Chan 'Policies, not politics: The pursuit of justice in prosecutorial strategy at the International Criminal Court' (2012) available at [https://www.researchgate.net/.../251354817\\_Policies\\_Not\\_Politics\\_The\\_Pursuit\\_of\\_Justi](https://www.researchgate.net/.../251354817_Policies_Not_Politics_The_Pursuit_of_Justi). (accessed 17 November 2016).

<sup>682</sup> Fatou Bensouda, Prosecutor-elect of the ICC 'Gender justice and the International Criminal Court – Progress and reflections' 14 February 2012 available at <https://www.icc-cpi.int/NR/.../StatementgenderSydney140212.pdf> (accessed 10 November 2016). Fatou Bensouda, Prosecutor of the ICC 'The investigation and prosecution of sexual



Paper on Sexual and Gender-based Crimes, setting out the OTP's policy relating to SGBCs with the purpose of guiding the OTP on matters relating to SGBCs.<sup>683</sup> The policy paper 'is based on the Statute, the Rules, the Regulations of the Court, the Regulations of the Office, the Office's Prosecutorial Strategies and other related policy documents'.<sup>684</sup> It also seeks to address the past mistakes made by the OTP in its first few years of investigating and prosecuting SGBCs<sup>685</sup> caused by the ICC's lack of defined goals and priorities in its selective decisions.<sup>686</sup> This section will consider how the OTP has sought to rectify these mistakes and its improvement in its investigation and prosecution of SGBCs.

### **3.4.1 Incorporating a Gender Perspective in the Work of the International Criminal Court.**

Throughout the Policy Paper, the OTP states its commitment to applying a gender perspective and analysis in all areas of its work. It aims to do this from the preliminary examination stage through to the prosecution of SGBCs and reparations proceedings.<sup>687</sup> The OTP has made the integration of gender analysis one of its core strategic goals, as well as focus on SGBCs and those crimes committed against children.<sup>688</sup>

The Policy Paper for example provides that:

All staff from the various Divisions involved in the investigation shall be responsible for integrating a gender perspective within the investigations, and for ensuring that sexual and gender-based crimes are thoroughly addressed at each stage of the investigative process.<sup>689</sup>

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and gender-based crimes: reflections from the Office of the Prosecutor' 24 August 2015 available at <https://www.hagueacademy.nl/.../Opening-keynote-speech-The-Hague-Academy-of-International-Law-Advanced-Course-on-International-...> (accessed 10 November 2016).

<sup>683</sup> *Idem* at para 7.

<sup>684</sup> *Idem* at para 10.

<sup>685</sup> *Ibid.*

<sup>686</sup> deGuzman 'Choosing to prosecute' at 267 at 269 and 274 (stating that the 'ICC's inability to justify its selection decisions by reference to a coherent theory of its goals and priorities undermines its efforts to build legitimacy).

<sup>687</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at Executive summary para 4 and para 14.

<sup>688</sup> *Idem* at paras 5 and 37. ICC-OTP, Strategic Plan June 2012 – 2015, 11 October 2013, Strategic goal 3 which provides to 'enhance the integration of a gender perspective in all areas of our work and continue to pay particular attention to sexual and gender-based crimes and crimes against children' at 17 and 27 available at <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> (accessed 11 November 2016). ICC-OTP, Strategic Plan| 2016-2018, 6 July 2015, Strategic goal 2 at 6, 11 and 17 available at [https://www.icc-cpi.int/.../070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/.../070715-OTP_Strategic_Plan_2016-2018.pdf) (accessed 11 November 2016).

<sup>689</sup> *Idem* at para 53. Paragraph 14 provides that the OTP will 'positively advocate for the inclusion of sexual and gender-based crimes and a gender perspective in litigation before the chambers' pursuant to article 21(3) of the Rome Statute. Paragraph 20 provides that the OTP 'will apply a gender analysis to all of the crimes within its



In applying a gender perspective throughout its work, right from when it triggered its jurisdiction, the OTP attempts to ensure that the mistakes, which occurred in the Lubanga case, do not reoccur, in which case it would have had sufficient evidence to bring charges against perpetrators of SGBCs. The OTP would therefore be in a position to ‘react promptly to [an] upsurge of violence’,<sup>690</sup> including SGBV.

### 3.4.2 Effective Investigations of Sexual and Gender-based Crimes

The OTP admits that SGBCs are some of the most difficult crimes to investigate and prosecute, given the challenges specific to these crimes. These challenges include:

The under – or non-reporting of sexual violence owing to societal, cultural, or religious factors, stigma for victims of sexual and gender-based crimes, limited domestic investigations, and the associated lack of readily available evidence; lack of forensic or other documentary evidence owing *inter alia*, to the passage of time; and inadequate or limited support services at national level.’<sup>691</sup>

The OTP has adopted specific measures to address these problems, for instance not relying solely on witness statements, but also obtaining other evidence such as documentary and forensic evidence.<sup>692</sup> Such evidence would be collected to strengthen its case, and by doing so would overcome the problem faced in the *Katanga and Ngudjolo* cases in which the Pre-Trial Chamber refused to allow the Prosecutor to introduce two witnesses’ statements until it was satisfied about the witnesses’ security.<sup>693</sup> This would entail improving the Prosecutor’s resources to enable resort to high technical means required to obtain such evidence.<sup>694</sup>

By the time the OTP starts investigating SGBCs, the evidence relating to these crimes may appear unreliable at trial due to the time lag between when the SGBV occurred and the collection of evidence. The policy paper seeks to address this point by taking into account the circumstances in which the evidence emerged when a SGBC first occurred, and how reliable it

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jurisdiction.’ Paragraph 29 provides that the OTP ‘will apply a gender analysis to the contextual elements of the crimes’ which fall under the subject-matter jurisdiction of the ICC, as well as ‘the elements of the underlying acts.’

<sup>690</sup> *Idem* at para 47.

<sup>691</sup> *Idem* at para 53.

<sup>692</sup> *Idem* at para 51.

<sup>693</sup> *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* ‘Decision on evidentiary scope of the confirmation hearing’ at para 39. Sacouto and Cleary ‘The importance of effective investigation’ at 342. Sacouto ‘International law weekend’ at 270-271.

<sup>694</sup> In its Strategic Plan, the OTP has pointed to the importance of having an increase in its resources for it to perform high quality preliminary examinations, investigations and prosecutions. ICC-OTP, Strategic Plan June 2012 – 2015 at 6 and 14-15. ICC-OTP, Strategic Plan| 2016-2018, Strategic goal 2 at 9.

might be by the time the OTP investigated the incident. The policy paper provides for this by stating that the OTP will:

...react promptly to upsurges of violence, including sexual and gender-based crimes, by reinforcing early interaction with States and international and non-governmental organisations, in order to verify information on alleged crimes, to encourage genuine national proceedings and to prevent the recurrence of crimes.<sup>695</sup>

The OTP will therefore, engage the community networks and contacts and enlist their cooperation, especially that of first responders to SGBCs.<sup>696</sup> In doing so, the OTP stands a better chance of obtaining reliable evidence relating to these crimes, as it is these first responders who gather the information when the evidence is still fresh. In its 2016 to 2018 Strategic Plan, the OTP stated that it had entered discussions with various first responders, such as NGOs, as to how each could support the other in their work.<sup>697</sup> The OTP would need to educate these first responders on to how to obtain admissible evidence. The publication of its policy papers, such as its SGBC Policy Paper, has helped promote transparency and clarity in the hope that the OTP and the other actors will cooperate with the policy.<sup>698</sup>

Although the OTP maintains its focused approach of investigating crimes within its jurisdiction, it has adopted an ‘in-depth, open ended’ method of investigating these crimes,<sup>699</sup> so that the OTP will be able to obtain more evidence from various sources, thereby meeting a higher evidentiary threshold. This method of investigation will assist the OTP in applying various case hypotheses, thus strengthening its decision-making in cases it prosecutes.<sup>700</sup> It also means that SGBCs will be considered, especially as the OTP now applies a gendered analysis to crimes within its jurisdiction.<sup>701</sup> Thus, the OTP will investigate allegations of SGBCs thoroughly, since a wide range of alleged crimes and incidents would be investigated.

### **3.4.3 Bringing charges for Sexual and Gender-based Crimes.**

In bringing charges, the OTP will give attention to crimes, which are under-prosecuted, including SGBCs such as rape.<sup>702</sup> The OTP will bring charges for SGBCs where there is sufficient

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<sup>695</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at para 55.

<sup>696</sup> *Idem* at paras 39 and 47.

<sup>697</sup> ICC-OTP, Strategic Plan| 2016-2018 at 12-13.

<sup>698</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at para 12.

<sup>699</sup> *Idem* at para 52. ICC-OTP, Strategic Plan June 2012 – 2015 at 6.

<sup>700</sup> *Ibid. Ibid.*

<sup>701</sup> *Idem* at paras 20 and 59.

<sup>702</sup> ICC-OTP, Policy Paper on Case Selection and Prioritisation at para 46.

evidence that these crimes have been committed.<sup>703</sup> The OTP will also bring charges for SGBV where the crimes form acts of other violence such as rape, which is charged as torture or genocide.<sup>704</sup> By doing so, the OTP is ensuring that crimes of SGBV are charged and prosecuted wherever possible, thereby ensuring that perpetrators of SGBV are brought to book. As will be seen in chapter 4, although the OTP brought cumulative charges in the *Bemba* case, the Pre-trial Chamber rejected the cumulative-charging approach. This suggests that the Prosecutor will still encounter problems at trial relating to SGBCs where the judges are not convinced of the propriety of the reasons for which why such charges are brought before the court.

The OTP is also prepared to change its strategy as to whom it would investigate and prosecute in order to carry out the Rome Statute's object and purpose. It acknowledges that there will be instances when it will be difficult for it to investigate those most responsible for the most serious crimes, which include SGBCs. In order to bridge this impunity gap, the OTP would investigate and prosecute 'middle or even low ranking officers or individuals'.<sup>705</sup> Victims would also welcome the prosecution of these classes of perpetrators, since they would be the actual perpetrators of the SGBV against them. Seeing middle or even low ranking officers or individuals convicted and imprisoned would mean that the victims would see them removed from the community where they would have been constant reminders of the harm committed on them.<sup>706</sup>

In addition to this change of strategy the OTP would bring to court cases which were ready for trial, taking its cue from judges such as Judge Hans-Peter Kaul to ensure that cases be 'as trial ready as possible' by confirmation of hearing stage.<sup>707</sup> In a dissenting opinion, Judge Kaul advised the Prosecutor to complete investigations 'at the time of the hearing . . . unless the Prosecutor justifies investigations after confirmation with compelling reasons'.<sup>708</sup> An example of this is evidence that becomes available after the confirmation hearing for the first time during an

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<sup>703</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at para 71.

<sup>704</sup> *Idem* at para 72.

<sup>705</sup> *Idem* at para 23. ICC-OTP, Strategic Plan June 2012 – 2015 at 6.

<sup>706</sup> Cecile Aptel 'Prosecutorial discretion at the International Criminal Court and victim's rights: Narrowing the impunity gap' (2012) 10 *Journal of International Criminal Justice* 1357 at 1370.

<sup>707</sup> ICC-OTP, Strategic Plan| 2016-2018, Strategic goal 2 at 15.

<sup>708</sup> Dissenting Opinion of Judge Hans-Peter Kaul, *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' (23 January 2012) ICC-01/09-02/11 para 57.

ongoing conflict.<sup>709</sup> As stated by Judge Kaul, obtaining evidence before trial would assist the OTP from the danger of the Pre-Trial Chamber refusing to commit a suspect for trial due to inadequate evidence.<sup>710</sup> The OTP states that where this is ‘not possible when the Prosecutor applies for a warrant of arrest or summons to appear . . . the Office will only proceed with the application if there are sufficient prospects to further collect evidence to be trial-ready within a reasonable time frame’.<sup>711</sup> By being as trial ready as possible by the confirmation of hearing stage, the length of its trials would be reduced which would help reduce costs. In the *Mathieu Ngudjolo* trial for instance, which resulted in an acquittal, the Chamber heard 54 witnesses and sat for 265 days and 643 exhibits were presented in evidence.<sup>712</sup>

### 3.5 CONCLUSION

Through an analysis of the Prosecutor’s powers in the admissibility of situations and cases as provided for under the Rome Statute, this chapter concludes that the Prosecutor applies the same criteria and standards for all preliminary examinations, including those relating to SGBCs committed in armed conflict situations. However, the Prosecutor’s powers diverge when she applies her discretion as to which types of crimes are investigated and prosecuted. It was established that the first Prosecutor’s lack of defined goals and priorities in his selection of situations and cases created lost opportunities in prosecuting and in obtaining convictions for SGBCs. In his first opportunities to prosecute SGBCs, he preferred to investigate and prosecute crimes that were easier to prosecute in order to secure positive outcomes for the ICC and minimise the OTP’s financial costs. The current Prosecutor is attempting to address these failures as set out in the Policy Paper on Sexual and Gender-Based Crimes released by her. The persuasive weight of this paper was enhanced by consulting and obtaining input from various bodies.

It is important that the Prosecutor applies the objectives set out in this policy paper when making decisions on the selection of situations and prosecution of cases for trial. The success of these objectives will only be established when the Prosecutor brings more cases relating to

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<sup>709</sup> *Idem* at 55 and 57.

<sup>710</sup> *Idem* at 57.

<sup>711</sup> ICC-OTP, Strategic Plan| 2016-2018, Strategic goal 2 at 15-16.

<sup>712</sup> *Prosecutor v Mathieu Ngudjolo* ‘Judgment pursuant to article 74 of the Statute’ (18 December 2012) ICC-01/04-02/12, paras 23 and 24.

SGBC to trial. Whilst it would be impossible to meet the expectations of all SGBV victims, the Prosecutor still needs to prosecute more cases relating to SGBV and obtain convictions. This is necessary so that perpetrators of SGBCs may come to realise that crimes are ‘the most serious crimes of concern to the international community as a whole’ which ‘must not go unpunished’.<sup>713</sup> At the same time as the Prosecutor’s caseload increases, states would need to take up their responsibility and adapt their legislation to prosecute SGBCs themselves. The DRC, for instance, recently implemented the Rome Statute as part of its law, 14 years after the ICC was established. Many other states which are experiencing SGBV on a daily basis must first take active steps to bring cases relating to SGBCs before its courts. Such issues will be dealt with in chapter six.

A major area of concern, which this chapter evidences, is that despite the publication of the Policy Paper on Sexual and Gender-Based Crimes attempting to bridge the impunity gap for SGBCs, the ICC will still face the challenge of trying to prosecute heads of state and senior government officials who are guilty of committing SGBCs in armed conflict situations. This will create an impunity gap in the number and range of perpetrators the ICC can try. Although the 2016 Policy Paper on Case Selection and Prioritisation is in line with article 27 of the Rome Statute, it will be difficult for the Prosecutor to prosecute and obtain convictions against heads of state and senior government officials. Given that the ICC does not have its own independent police force, states are unlikely to cooperate with the ICC in the arrest and surrender of these senior state actors, as witnessed in the case against Al-Bashir. In addition, an African state could decide not to cooperate with the ICC in the investigation and prosecution of SGBCs which were committed on its territory where its official is the defendant in the ICC case. The ICC cannot avoid being caught up in the politics of that state if it decides to carry out an investigation in its territory. The ICC should prosecute perpetrators of SGBCs, other than heads of state or senior governmental officials, if it seeks the cooperation of that state in its investigation and prosecution of that case. As chapter 5 will show, the African Union (AU) granted heads of state and their senior government officials’ immunity at the regional level. The current dispute between the ICC and the AU on immunity for these sets of people means that it is unlikely that many African states will be willing to have this set of perpetrators prosecuted at the international level.

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<sup>713</sup> Rome Statute, Preamble.

## CHAPTER 4

### THE ADMISSIBILITY OF SEXUAL AND GENDER-BASED VIOLENCE COMMITTED IN ARMED CONFLICT SITUATIONS BEFORE THE ICC

#### 4.1 INTRODUCTION

Despite promising provisions in the Rome Statute relating to the investigation and prosecution of sexual and gender-based violence (SGBV) committed during armed conflict situations,<sup>714</sup> the ICC has not since its coming into force in 2002 successfully obtained a conviction for sexual and gender-based crimes (SGBCs). The first few cases before the ICC relating to SGBV, which occurred during armed conflict situations, have highlighted the difficulties involved in obtaining a conviction for these crimes. Such challenges are not peculiar to ICC cases. The International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) faced similar problems, with prosecutors omitting charges for these crimes, drafting improper charges and judges requiring a high evidential standard for convictions.<sup>715</sup> The Appeals Chamber decision acquitting Bemba of all charges, including rape, is a recent example of the high evidential standard required by the ICC.<sup>716</sup> In addition, the conflict between the Office of the Prosecutor (OTP) and the ICC Chambers on the interpretation of certain provisions in the Rome Statute has affected whether or not certain SGBV charges proceed to trial.<sup>717</sup> Although

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<sup>714</sup> See for example article 36(8) (b) of the Rome Statute which provides for judges to have ‘legal expertise on specific issues relating [sic] to violence against women and children.’ See also article 54(1)(b) of the Rome Statute which states that the Prosecutor should ‘take appropriate measures to ensure the effective investigation and prosecution of crimes within the ICCs jurisdiction [sic] and in doing so ... take into account the nature of the crime, in particular where it involves sexual violence, gender violence and children.’

<sup>715</sup> Susana Sacouto and Katherine Cleary ‘The importance of effective investigation of sexual violence and gender-based crimes at the International Criminal Court’ (2009) 17 *American University Journal of Gender, Social Policy and the Law* 337 at 348-358. Valerie Oosterveld ‘Gender-sensitive justice and the International Criminal Tribunal for Rwanda: Lessons learned for the International Criminal Court’ available at [www.peacewomen.org/assets/file/PWandUN/.../itrc\\_oosterveld\\_2005.pdf](http://www.peacewomen.org/assets/file/PWandUN/.../itrc_oosterveld_2005.pdf) (accessed 13 March 2016) (stating that the negotiators of the Rome Statute realised the importance of including gender-sensitive articles relating to investigations and prosecutions of SGBC from the negative experiences of the ICTR).

<sup>716</sup> See Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo available at <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat> (accessed 20 July 2018) (stating that ‘the level of detail that the Prosecution may now be required to include in the charges may render it difficult to prosecute future cases entailing extensive campaigns of victimisation.’ See Chapter 3, section 3.1 already referring to this statement).

<sup>717</sup> Virginia C Lindsay ‘A review of International Criminal Court proceedings under Part V of the Rome Statute (investigation and prosecution) and proposals for amendments’ (2010) *Revue Quebecoise de Droit International* 165 at 189 referring to Matthew Happold, ‘Prosecutor v Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007’ (2007) 56 *International and Comparative Law Quarterly* at 713 (stating that ‘it is also evident that there is a struggle between the Office of the Prosecutor and Chambers over the extent to which each controls proceedings before the Court.’). Also see Dov Jacobs ‘The ICC Katanga Judgment: A

scholars welcomed the fact that the Rome Statute makes provision for fair representation of female and male judges,<sup>718</sup> the representation of female judges in the ICC has not necessarily helped overcome the problems faced in obtaining a successful prosecution of these crimes.

Whilst chapter 3 considered the prosecutor's discretionary powers relating to SGBV, this chapter examines cases relating to SGBV in armed conflict situations which have come before the ICC. The purpose of such consideration is to highlight the recognition that SGBV-related crimes in international treaties are still among the most difficult crimes to prosecute.<sup>719</sup> After the *Lubanga* case the prosecution dragged its heels in prosecuting such crimes, and when it did, it faltered in obtaining substantial evidence to prove its case. At the same time, the judges were not comfortable 'to hold individuals accountable for sex crimes unless they [were] the physical perpetrators, they were present when crimes were committed, or they [could] be linked to evidence encouraging the crimes.'<sup>720</sup>

This chapter commences in the first section, by considering those cases before the ICC relating to SGBV which occurred in the Democratic Republic of Congo (DRC). The next section considers a Ugandan case and the section thereafter on the Central African Republic (CAR) case.

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commentary (part 2) Regulation 55 and the modes of liability' available at <https://dovjacobs.com/.../the-icc-katanga-judgment-a-commentary-part-2-regulation-5...> (accessed 13 March 2016). With regard to Regulation 55 of the Regulations of the Court Jacobs argues that the judges' adoption of Regulation 55 of the Regulations of the Court adds a 'new element to the Rome Statute's framework on the amendment of charges,' thus giving judges' *proprio motu* powers to amend charges at various stages of proceedings.

<sup>718</sup> Rome Statute, art 36(8)(a)(iii) provides that '[t]he State Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for ... [a] fair representation of female and male judges.' There are currently six female judges and 12 male judges at the ICC. This number excludes Judge Sylvia Steiner, who has served her term as a judge but will be staying to complete a trial. Current Judges – Biographical Notes available at <https://www.icc/.../the%20judges/Pages/judges.aspx> (accessed 13 March 2016). Cherie Booth and Max Du Plessis 'The International Criminal Court and victims of sexual violence,' (2005) 18 *South African Journal of Criminal Justice* 241 at 248 (where the authors state that 'states are finally taking seriously the idea of a 'legitimate' international judiciary. International justice must be seen to be fair and representative of international society as a whole, and the Rome Statute has thankfully set a new standard among international courts, which have tolerated for too long a time an under-representation, or all too often a complete absence, of female judges.'). Kelly Askin 'Katanga judgment underlines need for stronger ICC focus on sexual violence' available at [www.ijmonitor.org/.../katanga-judgment-underlines-need-for-stronger-icc-focus-on-sexual-violence...](http://www.ijmonitor.org/.../katanga-judgment-underlines-need-for-stronger-icc-focus-on-sexual-violence...) (accessed 25 July 2016) (stating that 'many of the gains we have seen, in the recognition of various forms of sexual violence as serious violations of international laws, are due in no small part to having more women in positions of power as investigators, prosecutors and judges in the international tribunals, as well the impact of an effectively organised caucus of women's groups who have pushed for changes').

<sup>719</sup> Margot Wallstrom for example, a former Special Representative on sexual violence in conflict has pointed out that it is not because the laws are inadequate that women are not being protected from sexual violence, but because the laws are inadequately enforced. UN News Centre 'Tackling Sexual Violence must include prevention, ending impunity – UN Official' available at [www.un.org/apps/news/story.asp?NewsID=34502](http://www.un.org/apps/news/story.asp?NewsID=34502) (accessed 15 March 2016).

<sup>720</sup> Askin 'Katanga judgment underlines need for stronger ICC focus on sexual violence.'

The section also considers how the Appeals Chamber decision in the *Bemba* case affects the prosecution of SGBC's committed in armed conflicts.

## 4.2 THE DEMOCRATIC REPUBLIC OF CONGO CASES

The referral of crimes which have been committed in DRC since the Rome Statute came into force on 1 July 2002 came about after the President of the DRC referred matters to the ICC's Chief Prosecutor in a letter dated 3 March 2004.<sup>721</sup> The armed conflict situation occurred in the DRC in the late 1990s over land allocation and natural resources and cost many civilians their lives amidst allegations of SGBV and other crimes.<sup>722</sup> Luis Moreno-Ocampo, the Chief Prosecutor at that time, having fulfilled the requirements under article 53 of the Rome Statute and Rule 104, made a determination that there was a reasonable basis to conduct an investigation into the crimes, allegedly committed on the territory of the DRC.<sup>723</sup> The ICC Presidency assigned the situation in the DRC to Pre-Trial I on 5 July 2004.<sup>724</sup>

### 4.2.1 Thomas Lubanga Dyilo's Case.

As already discussed in chapter 3,<sup>725</sup> the Prosecutor did not bring charges for SGBCs against Lubanga even though rape and other sexual offences had been a dominant feature in north-eastern DRC and had been widely documented by United Nations (UN) agencies, various human rights groups and non-governmental organisations (NGOs).<sup>726</sup> Chapter 3 has already outlined the

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<sup>721</sup> Situation in the Democratic Republic of Congo 'Decision assigning the situation in The Democratic Republic of Congo to the Pre-Trial Chamber I' (5 July 2004) ICC-01/04 (where a letter from the Prosecutor dated 17 June 2004 was annexed to this decision making mention of the referral by the DRC and Uganda).

<sup>722</sup> The Office of the Prosecutor of the International ... ICC, available at [www.icc-cpi.int/.../icc/.../the%20office%20of%20the%20prosecutor%20](http://www.icc-cpi.int/.../icc/.../the%20office%20of%20the%20prosecutor%20) (accessed on 15 March 2016). AMICC 'Proceedings before trial in the case of The *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* at the International Criminal Court' available at [www.amicc.org/docs/KatangaandNgudjolocc.pdf](http://www.amicc.org/docs/KatangaandNgudjolocc.pdf) (accessed 15 March 2016).

<sup>723</sup> Situation in the Democratic Republic of Congo 'Decision assigning the situation in The Democratic Republic of Congo to the Pre-Trial Chamber I.' Article 53 of the Rome Statute provides the requirements, which the Prosecutor will take for the initiation of an investigation. The Rules of Procedure and Evidence of the ICC is the 'instrument for the application of the Rome Statute of the ICC, to which they are subordinate in all cases.' Rule 104 of the Rules of Procedure and Evidence provides for the evaluation of information by the prosecutor.

<sup>724</sup> *Ibid.*

<sup>725</sup> See chapter 3, section 3.3.1

<sup>726</sup> Re-dated version of confidential letter submitted to the Office of the Prosecutor, written by Brigid Inder, Executive Director of Women's Initiatives for Gender Justice to Luis Moreno Ocampo, Chief Prosecutor of the ICC available at [http://www.iccwomen.org/documents/Prosecutor\\_Letter\\_August\\_2006\\_Redated.pdf](http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redated.pdf) (accessed 5 March 2016). Gender Report Card 2009, 55 at 69 available at [www.iccwomen.org/publications](http://www.iccwomen.org/publications) (accessed 5 March 2016). DR Congo: ICC charges raise concern, joint letter from various human rights organisations to Luis Moreno Ocampo, Chief Prosecutor of the ICC available at <http://www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern> (accessed 5 March 2016).



Prosecutor's inconsistent reasons for his reluctance to prosecute SGBCs such as rape.<sup>727</sup> Thus, the focus in this case is the victims' lost opportunity in receiving reparations, due to the non-prosecution of SGBCs.

In the Document Containing the Charges (DCC)<sup>728</sup> filed by the Prosecutor on 28 August 2006, Lubanga was charged with three counts of war crimes under articles 8(2)(e)(vii)<sup>729</sup> and 25(3)(a)<sup>730</sup> of the Rome Statute. These counts were in relation to 'conscripting and enlisting children under the age of fifteen years' into the *Force Patriotique pour la Liberation du Congo* (FPLC), of which he was commander-in-chief, between 1 July 2002 and 31 December 2003, and 'using them to participate actively in hostilities', in a non-international armed conflict context.<sup>731</sup> Notably, in its decision of 29 January 2007 given at the confirmation hearing,<sup>732</sup> which was held from 9 to 28 November 2006,<sup>733</sup> the Pre-Trial Chamber 1 went further than merely confirming the charges contained in the DCC by holding that Lubanga should also be charged for these crimes in an international armed conflict context. Consequently, the charges confirmed by Pre-Trial Chamber 1 against Lubanga provided that:

Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003.

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<sup>727</sup> See chapter 3, section 3.3.1.

<sup>728</sup> The Document Containing the Charges (DCC) is the document containing 'a detailed description of the charges' which the Prosecutor intends to bring the person charged to trial. As it establishes 'in detail the nature, cause and content of the charge(s) brought against the accused, this document frames the confirmation hearing. The Prosecutor must provide the Pre-Trial Chamber and the accused with the DCC 'no later than thirty days before the date of the confirmation hearing.' Rome Statute, arts 61(3)(a) and 67(1). Rules of Procedure and Evidence, Rule 121(3).

<sup>729</sup> Rome Statute, art 8(2)(e)(vii) refers to war crimes applicable to armed conflicts not of an international character. See Chapter 2 regarding the contextual elements of a war crime in the Rome Statute.

<sup>730</sup> Rome Statute, art 25(3)(a) provides that:

Article 25(3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

<sup>731</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Document containing the charges article 61(3)(a)' (28 August 2006) ICC-01/04-01/06, paras 6 and 20.

<sup>732</sup> The confirmation hearing is a hearing where the Pre-Trial Chamber confirms the charges on which the Prosecutor intends to seek trial. The Pre-Trial Chamber thus 'determines whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.' It, thus, protects the defendant's rights against 'wrongful and wholly unfounded charges.' Rome Statute, art 61(7). *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (30 September 2008) ICC-01/04-01/07, para 63.

<sup>733</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Decision on the confirmation of charges' (29 January 2007) ICC-01/04-01/06, para 30.

Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003.<sup>734</sup>

The Pre-Trial Chamber confirmed these charges without giving the prosecutor an opportunity to amend them as required by article 61(7)(c)(ii) of the Rome Statute.<sup>735</sup> The Chamber stated that this was not necessary, as articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute criminalised the same conduct, regardless of whether the conflict was classified as international or non-international.<sup>736</sup> Thereafter, the Trial Chamber ordered the prosecution to amend the DCC. In response to the Trial Chamber's order, the prosecution filed the amended document on 22 December 2008.<sup>737</sup> In handing down its judgment on 14 March 2012, the Trial Chamber re-modified the legal characterisation of the facts to a non-international armed conflict as characterising the conflict during the period September 2002 to 13 August 2003.<sup>738</sup>

During the course of the trial, victims' legal representatives filed a joint application on 22 May 2009 requesting the Trial Chamber to modify the legal characterisation of the facts to include crimes against humanity and war crimes of sexual slavery and war crimes of inhuman or cruel treatment.<sup>739</sup> The Prosecutor and Lubanga appealed against the majority Trial Chamber's decision to modify the legal characterisation of the facts.<sup>740</sup> Consequently, the Appeals Chamber

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<sup>734</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Judgment pursuant to article 74 of the Statute' (14 March 2012) ICC-01/04-01/06, paras 1 and 525.

<sup>735</sup> Rome Statute, art 61(7)(c)(ii) provides:

61(7) The Pre-Trial Chamber shall on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(c) Adjourn the hearing and request the Prosecutor to consider:

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

<sup>736</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Decision on the confirmation of charges' at paras 202 and 204. For a critic on the Pre-Trial Chamber I *sua sponte* amendment of the charges which it confirmed see Dov Jacobs, 'A shifting scale of power: Who is in charge of the charges at the International Criminal Court and the uses of regulation 55' in William Schabas, Niamh Hayes and Yvonne McDermott (eds) *The Ashgate Research Companion To International Criminal Law Critical Perspectives* (2011) 1 at 8-9.

<sup>737</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Prosecution's provision of the amended document containing the charges' (23 December 2008) ICC-01/04-01/06.

<sup>738</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Judgment pursuant to article 74 of the Statute' at paras 566, 567 and 1359.

<sup>739</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court' (14 July 2009) ICC-01/04-01/06, para 1.

<sup>740</sup> Lubanga appealed on the 11 August 2009 whilst the Prosecutor appealed on 12 August 2009. *Prosecutor v Thomas Lubanga Dyilo* 'Judgment on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the decision of Trial Chamber I of 14 July 2009' at para 6.

reversed the decision of the Trial Chamber to modify the legal characterisation of the facts in the charges.<sup>741</sup>

#### 4.2.1.1 Sentencing of Lubanga

The Trial Chamber I convicted Lubanga on 14 March 2010 for war crimes of conscripting, enlisting and using children under the age of 15 years into the FPLC ‘to participate actively in hostilities within the meaning of article 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003’.<sup>742</sup> The Trial Chamber found that its hands were tied in making a decision on the evidence of sexual violence, as the Prosecution had failed to bring charges against the accused for such crimes.<sup>743</sup> It found that the allegations of sexual violence were only relevant to provide context, and reserved the issue of sexual violence as a matter for sentence and reparations.<sup>744</sup>

Lubanga was sentenced to 14 years imprisonment, with the time he had already spent in custody taken into consideration.<sup>745</sup> In its judgment on sentence on 10 July 2012, the Trial Chamber I strongly criticised the method and manner in which the Prosecutor, Luis Moreno-Ocampo, had handled the issue of sexual violence. The Chamber observed that whilst the Prosecutor had made substantial submissions regarding sexual violence in his opening and closing speeches at trial, and that he had asked the Trial Chamber to take into account sexual violence as an aggravating factor in sentencing,<sup>746</sup> he had failed to apply for charges of sexual violence or sexual slavery to be added to the original charges either *ab initio* or during the trial, and in fact opposed the addition of such crimes to the charges during the trial on the basis that this would be prejudicial to the accused.<sup>747</sup> In his closing speech, the prosecutor had argued that as he sought the charges to be confined to conscripting, the evidence of the crimes of rape and sexual slavery was presented to highlight the suffering of the girl soldiers under the main

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<sup>741</sup> *Idem* at para 112.

<sup>742</sup> *Prosecutor v Thomas Lubanga Dyilo* ‘Judgment pursuant to article 74 of the Statute’ at para 1358.

<sup>743</sup> *Idem* at para 896. Judge Odio Benito gave a separate and dissenting opinion.

<sup>744</sup> *Idem* at paras 29 and 896.

<sup>745</sup> *Idem* at paras 107-108.

<sup>746</sup> *Idem* at para 60.

<sup>747</sup> *Prosecutor v Thomas Lubanga Dyilo* ‘Decision on sentence pursuant to article 76 of the Statute’ (10 July 2012) ICC-01/04-01/06, para 60. *Prosecutor v Thomas Lubanga Dyilo* ‘Prosecution’s application for leave to appeal the “Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with regulations 55(2) of the Regulations of the Court”’ (12 August 2009) ICC-01/04-01/06.

charge.<sup>748</sup> The Trial Chamber also noted that whilst the prosecutor argued that the witnesses' evidence on sexual violence and rape was reliable and credible, it was only relevant to sentence because it did not form part of the case faced by Lubanga.<sup>749</sup> The prosecutor's failure to charge the accused with sexual violence and rape did not deter the Chamber from considering such crimes as relevant factors in its determination of sentence as required by Rules 145(1)(c)<sup>750</sup> and 145(2)(b)(iv)<sup>751</sup> of the Rules of Procedure and Evidence, (the Rules).<sup>752</sup> The Chamber, however, found that the evidence failed to establish beyond reasonable doubt the link between the accused's conduct and sexual violence.<sup>753</sup> The Chamber reserved for a later decision the issue of whether sexual violence would be relevant to the determination of reparations.<sup>754</sup>

In her dissenting opinion, in accordance with Rule 145(1)(c) of the Rules on sentencing, Judge Odio Benito disagreed with the majority decision, finding the evidence of sexual violence was relevant to the harm caused to the victims and their families.<sup>755</sup> She found that there was sufficient evidence before the Trial Chamber that sexual violence had caused the children to suffer harm because of recruitment into the militia. Her colleagues should have distinguished 'between the factual allegations of the case', and the legal concept of 'use to participate actively in the hostilities', as both were independent factors.<sup>756</sup> In Judge Benito's opinion, SGBV crimes 'should have been included within the legal concept "use to participate actively in the

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<sup>748</sup>Office of the Prosecutors closing statements (Open Session), at 54 available at <http://www-icc-cpi.int/icc.docs/doc/doc1210316.pdf> (accessed 25 March 2016).

<sup>749</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Decision on sentence pursuant to article 76 of the Statute' (10 July 2012) ICC-01/04-01/06, para 61.

<sup>750</sup> Rule 145(1)(c) Rules of Procedure and Evidence provides:

145(1) In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime, the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

<sup>751</sup> Rule 145(2)(b)(iv) Rules of Procedure and Evidence provides:

145(2) In addition to the factors mentioned above, the Court shall take into account, as appropriate:

(a) As aggravating circumstances:

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

<sup>752</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Decision on sentence pursuant to article 76 of the Statute' at para 67.

<sup>753</sup> *Idem* at para 75.

<sup>754</sup> *Idem* at para 76.

<sup>755</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Decision on sentence pursuant to article 76 of the Statute, separate dissenting Opinion of Judge Odio Benito' (10 July 2012) ICC-01/04-01/06, paras 2, 6, 8 and 22.

<sup>756</sup> *Idem* at para 16. The phrase 'using to participate actively in hostilities' is taken from article 8(2)(e)(vii) of the Rome Statute which reads 'conscription or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities'.

hostilities”’, as these crimes were an intrinsic part of the boys and girls ‘involvement with the armed group.’<sup>757</sup> She stated that the Chamber had a duty to make such a finding, even though it was prevented from considering evidence relating to sexual violence due to the provisions of article 74(2) of the Rome Statute.<sup>758</sup> She also pointed out that although sexual violence was an element which should have been included within the legal concept ‘use to participate actively in the hostilities’, crimes of sexual violence were separate crimes, which the Chambers could determine if charges for them had been brought by the Prosecutor. She was also of the opinion that taking these factors into consideration in the determination on sentencing would not be prejudicial to Lubanga, as he would have had sufficient notice, time and facilities to prepare his defence during the hearing.<sup>759</sup> Judge Benito’s dissenting opinion, underlines the necessity of having female judges on the bench, who are sensitive to gender issues.

Lubanga’s appeal against conviction and sentence was dismissed by a majority of the Appeals Chamber on 1 December 2014. The Trial Chamber’s I conviction and sentence of 14 years imprisonment was upheld.<sup>760</sup>

#### **4.2.1.2 A lost cause in obtaining reparation for victims of SGBV**

The decision on reparations by Trial Chamber I on 7 August 2012 in the *Lubanga* case was the first decision of its kind before the ICC.<sup>761</sup> With regard to SGBV, the Trial Chamber held that ‘the court should formulate and implement reparations awards that were appropriate for the victims of sexual and gender-based violence’.<sup>762</sup> It also held that the court should implement gender-sensitive measures in order to overcome the obstacles which women and girls may face when seeking justice.<sup>763</sup> On 3 March 2015, the Appeals Chamber amended the order on reparations given by the Trial Chamber on the ground that the crimes did not come within the definition of harm that resulted from the crimes for which Lubanga was convicted,<sup>764</sup> in that the

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<sup>757</sup> *Ibid.*

<sup>758</sup> *Idem* at para 17.

<sup>759</sup> *Idem* at paras 6 and 8.

<sup>760</sup> *Prosecutor v Thomas Lubanga Dyilo* ‘Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction’ (1 December 2014) ICC-01/04-01/06 A 5. *Prosecutor v Thomas Lubanga Dyilo* ‘Judgment on the appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo against the “Decision in Sentence pursuant to Article 76 of the Statute.”’

<sup>761</sup> Trial Chamber I, *The Prosecution v Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations (7 August 2012) ICC-01/04-01/06.

<sup>762</sup> *Idem* at para 207.

<sup>763</sup> *Idem* at 208.

<sup>764</sup> *Prosecutor v Thomas Lubanga Dyilo* ‘Judgment on the appeals against the “Decision establishing the principle and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A)

Trial Chamber had not found Lubanga guilty of harm which resulted from SGBV. The Appeals Chamber stated that the Trial Chamber should have explained how it reached the conclusion that Lubanga was liable for reparations relating to harm which resulted from SGBV.<sup>765</sup> The Appeals Chamber, however, pointed out that the victims were not prevented from obtaining assistance offered by the Trust Fund.<sup>766</sup>

NGOs have expressed their disappointment of the Appeals Chamber's ruling as the latest in the string of decisions which have failed to recognise the harm suffered by victims because of SGBV, despite the wealth of evidence of such crimes before the Court.<sup>767</sup> Child soldiers and victims who were not child soldiers who suffered from SGBV were denied reparations for SGBCs committed against them simply because the prosecutor failed to bring charges for SGBCs. This illustrated the need for the prosecutor not to bring charges within a narrow compass when the evidence pointed to other crimes. Oosterveld argues that shorter and more focused indictments could lead to the exclusion of charges relating to gender-based crimes,<sup>768</sup> especially when the ICC Trial Chamber would not necessarily go out of its way to include crimes which had not been pleaded by the prosecutor. This would apply even though the 'Chamber has a responsibility to define the crimes based on the applicable law and is not limited to the charges brought by the prosecution against the accused'.<sup>769</sup> The prosecutor's failure to include charges of SGBV, and the Trial Chamber's failure to include SGBV within the legal concept of 'use to participate actively within hostilities' means that victims in this case forfeited their right to compensation for these crimes, as some of the victims were not children under the age of 15.

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and public annexes 1 and 2' (3 March 2015) ICC-01/04-01/06 A A 2 A 3, para 196. Lubanga Case: ICC Appeals Chamber amends Trial Chamber's order for reparation to victims available at [www.icc-cpi-int/en\\_menus/icc/press%20and%20media/.../pr1092.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/.../pr1092.aspx) (accessed 15 March 2016). The legal representative of the victims, the Office of Public Counsel for victims on behalf of the victims they represented and Lubanga, appealed against the decision of Trial Chamber I.

<sup>765</sup> *Idem* at paras 197-8.

<sup>766</sup> *Idem* at para 199.

<sup>767</sup> See for example Women's Initiatives for Gender Justice. ICC issues first appeal judgment on reparations in the ... [www.icc.women.org/.../icc-issues-first-appeal-judgment-on-reparations](http://www.icc.women.org/.../icc-issues-first-appeal-judgment-on-reparations) (accessed 15 March 2016).

<sup>768</sup> Valerie Oosterveld 'Gender-sensitive justice and the International Criminal Tribunal for Rwanda: Lessons learned for the International Criminal Court' (2005) 12 *New England Journal of International and Comparative Law* 119 at 131-132.

<sup>769</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Judgment pursuant to article 74 of the Statute, separate dissenting opinion of Judge Odio Benito' at para 15.

#### 4.2.2 Germain Katanga and Mathieu Ngudjolo Chui's Case.

The case of *Katanga* and *Ngudjolo* was another missed opportunity for the OTP to obtain a conviction for crimes of SGBV. Interestingly, Heller argues that if the Trial Chamber had not re-characterised the facts, Katanga would have been acquitted of all the charges against him, just as Chui was acquitted.<sup>770</sup> Katanga was the military commander of *Force de resistance patriotique en Ituri* (FRPI), one of the militia groups operating in the Ituri region of the DRC. The Pre-Trial Chamber 1 issued a warrant of arrest under seal for his arrest on 2 July 2007<sup>771</sup> having found reasonable grounds to believe that he was 'criminally responsible under article 25(3)(a) or, in the alternative under article 25(3)(b)<sup>772</sup> of the Statute, for six counts of war crimes and three counts of crimes against humanity as an indirect co-perpetrator. The crimes related to attacks which occurred in Bogoro, a village in the DRC, on about 24 February 2003', which included sexual slavery as a war crime under article 8(2) (b)(xxii) or 8(2)(e)(vi) of the Rome Statute, and under article 7(1)(g) as crimes against humanity of the corresponding statute.<sup>773</sup> Katanga who was already detained by the Congolese authorities on another matter without charge, was surrendered to the ICC by the Congolese authorities on the 17 October 2007.

In the case of Ngudjolo, it was alleged by the prosecutor that he was the highest-ranking commander of *Front de nationalistes et integrationnistes* (FNI), another militia group from the Lendu ethnic tribe operating in the Ituri region of the DRC. In issuing a sealed warrant for his arrest on 6 July 2007, the Pre-Trial Chamber 1 found reasonable grounds to believe that Ngudjolo was criminally responsible for six counts of war crimes and three counts of crimes against humanity. Ngudjolo was also charged under article 25(3)(a) of the Rome Statute, alternatively under article 25(3)(b) of the same statute, as an indirect co-perpetrator for attacks which occurred in Bogoro on about 24 February 2003.<sup>774</sup> These charges included sexual slavery as a war crime under article 8(2)(b)(xxii) or 8(2)(e)(vi) of the Rome Statute, and crimes against

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<sup>770</sup> Kevin Jon Heller 'Another Terrible Day for the OTP' available at [opiniojuris.org/2014/03/08/another-terrible-day-otp/](http://opiniojuris.org/2014/03/08/another-terrible-day-otp/) (accessed on 25 March 2016).

<sup>771</sup> *Prosecutor v Germain Katanga* 'Warrant of arrest for Germain Katanga' (2 July 2007) ICC-01/04-01/07. The warrant of arrest was unsealed on 18 October 2007.

<sup>772</sup> For the text of article 25(3)(a) see footnote 20.

Rome Statute, art 25(3)(b) provides that:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

<sup>773</sup> *Prosecutor v Germain Katanga* 'Warrant of arrest for Germain Katanga.'

<sup>774</sup> *Prosecutor v Mathieu Ngudjolo Chui* 'Warrant of arrest for Mathieu Ngudjolo Chui (6 July 2007) ICC-01/04-02/07.

humanity under article 7(1)(g) of the corresponding statute.<sup>775</sup> The Congolese authorities arrested Ngudjolo on 6 February 2008 and handed him over to the ICC the next day.<sup>776</sup> The cases against both accused were joined by Pre-Trial Chamber I on 10 March 2008, decisions which were upheld by the Appeals Chamber. The decision by the Pre-Trial Chamber to join both cases was based on the fact *inter alia* that the supporting evidence and material facts relating to them concerned the same incident.<sup>777</sup>

#### 4.2.2.1 The confirmation hearing and severance of trial

The confirmation hearing, relating to both accused was held from 27 June to 16 July 2008. On 26 September 2008, based on the Amended Charging Document charges presented to Pre-Trial Chamber I,<sup>778</sup> the Chamber confirmed seven counts of war crimes, and three counts of crimes against humanity, but declined to confirm three other charges for insufficient evidence. The majority Chamber confirmed sexual slavery and rape as war crimes and crimes against humanity, but Judge Anita Usacka dissented on the ground that the prosecution's allegations were not sufficiently strong to prove that Katanga and Ngudjolo were criminally responsible for the commission of these crimes.<sup>779</sup> She could not find that

... the evidence presented is sufficient to establish substantial grounds to believe that the suspects intended for rape and sexual slavery to be committed during the attack at Bogoro village or even in the aftermath of the Bogoro attack, or to establish the suspects' knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of the events.<sup>780</sup>

Judge Usacka supported her decision by stating that the prosecution had not provided 'any direct evidence' that the suspects 'intended the common plan to attack Bogoro village to include rape or sexual slavery.'<sup>781</sup> The evidence was not sufficient to support the allegations made or to link

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<sup>775</sup> *Ibid.*

<sup>776</sup> Chui's warrant of arrest was unsealed on 7 February 2008.

<sup>777</sup> *Prosecutor v Germain Katanga* 'Decision on the joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui' (10 March 2008) ICC-01/04-01/07.

<sup>778</sup> The Prosecution filed the 'Prosecution's submission of Amended Document Containing the Charges and Additional List of Evidence' on 12 June 2008. Also filed was the 'Submission of Amended Document Containing the Charges Pursuant to Decision ICC-01/04-01/07-648' on 26 June 2008. The Chamber has referred to these documents as the 'Prosecution's Amended Charging Document or the Amended Charging Document.' *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* 'Decision on the confirmation of charges' (30 September 2008) ICC-01/04-01/07, para 11.

<sup>779</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* 'Decision on the confirmation of charges, partly dissenting opinion of Judge Anita Usacka' at para 14.

<sup>780</sup> *Ibid.*

<sup>781</sup> *Idem* at para 19.



the suspects with the crimes alleged.<sup>782</sup> She suggested that the Chamber adjourn the hearing to allow the Prosecutor obtain further evidence linking the suspects with these crimes.<sup>783</sup>

Katanga and Ngudjolo were committed for trial to a Trial Chamber by Pre-Trial Chamber I. On 24 October 2008 the Presidency of the ICC constituted Trial Chamber II, where the trial against Katanga and Ngudjolo commenced on 24 November 2009; with evidence presented from 25 November 2009 to 11 November 2011<sup>784</sup> and closing statements made from 15 to 23 May 2012.<sup>785</sup> At the deliberation stage, on 21 November 2012, the majority of Trial Chamber II, Judge van den Wyngaert dissenting, gave notice to the parties and participants, pursuant to regulation 55(2) of the Regulations of the Court of a re-characterisation of the mode of liability of the crimes relating to Katanga.<sup>786</sup> The re-characterisation included a charge against Katanga as an accessory under article 25(3)(d)(ii) of the Rome Statute. The Trial Chamber II stated that such a change was necessary as it reflected ‘the facts described in the Decision on the Confirmation of Charges, *scilicet*’.<sup>787</sup> The Chamber was of the opinion that the accused was not prejudiced, as he had the opportunity to defend himself on each of the relevant facts relating to article 25(3)(d) that had been raised at the trial.<sup>788</sup> This suggests that the ICC judges used regulation 55 to get round article 61(11) of the Rome Statute, which prevents Trial Chambers from amending charges that had been confirmed by Pre-Trial Chambers.<sup>789</sup> After the trial has commenced the prosecutor may only withdraw the charges with the Trial Chamber’s permission.<sup>790</sup> At this stage of the proceedings, neither the prosecutor nor the Trial Chamber can modify the charges.<sup>791</sup> The danger, however, of a re-characterisation in the mode of liability is that the Prosecution may not have the necessary evidence to support its case. In any event, the

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<sup>782</sup> *Idem* at para 23.

<sup>783</sup> *Idem* at para 29.

<sup>784</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’ at para 3.

<sup>785</sup> *Idem* at para 4.

<sup>786</sup> *Idem* at paras 6 and 7.

<sup>787</sup> *Idem* at paras 23 and 34.

<sup>788</sup> *Idem* at paras 23 and 33.

<sup>789</sup> Heller ‘A stick to hit the accused with.’

<sup>790</sup> Rome Statute, art 61(9) provides that:

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

<sup>791</sup> Jacobs ‘A shifting scale of power’ at 8 and 9.

ICC has a duty to ensure that the accused's rights are protected, which was not the case with re-characterisation of charges six months after the end of the trial, thus placing in question the legality of the judges' decision to change the mode of liability.

By a unanimous decision, the Trial Chamber II severed the proceedings against Katanga and Ngudjolo to avoid prolonging the proceeding against Ngudjolo, which would cause him serious prejudice.<sup>792</sup> On 27 March 2013 a majority of the Appeals Chamber dismissed Katanga's appeal against the re-characterisation of the mode of liability against him. It ordered that the legal characterisation of facts be modified pursuant to regulation 55(2) of the Regulations of the Court – subject to the rider that this would not necessarily assure fairness of the trial.<sup>793</sup>

#### **4.2.2.2 Mathieu Ngudjolo Chui Trial.**

On 18 December 2012, the Trial Chamber II unanimously acquitted Ngudjolo of all charges against him despite noting the wealth of evidence of, *inter alia*, rape of women and their captivity in Bogoro during and after the 24 February 2003 attack.<sup>794</sup> Having found the prosecution investigation evidence weak, and the testimony of the prosecution witnesses so contradictory as to be unreliable, the Trial Chamber concluded that the prosecution had failed to prove beyond a reasonable doubt that Ngudjolo was the commander-in-chief of the Lendu militia when the attacks on the Bogoro village occurred on 24 February 2003.<sup>795</sup> Although Ngudjolo seemed to be 'one of the military commanders, who held a senior position among the Lendu combatants from Bedu-Ezekere *groupement*', this could not be established beyond reasonable doubt.<sup>796</sup> In addition there was no credible evidence proving 'Ngudjolo had issued military orders or instructions, taken steps to enforce such orders or instructions, initiated disciplinary proceedings or ordered sanctions of this kind'.<sup>797</sup> Consequently, Trial Chamber II did not find it necessary to consider the actual crimes with which Ngudjolo had been charged.<sup>798</sup> The Trial Chamber II found flaws in the prosecution's case, including in its initial investigative documents,

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<sup>792</sup> *Idem* at paras 59 – 61.

<sup>793</sup> *Prosecutor v Germain Katanga* 'Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons"' (27 March 2013) ICC-01/04-01/07 OA 13, para 99.

<sup>794</sup> *Prosecutor v Mathieu Ngudjolo Chui* 'Judgment pursuant to article 74 of the Statute' (18 December 2012) ICC-01/04-02/12, 18 December 2012, para 338.

<sup>795</sup> *Idem* at paras 78, 499 and 503.

<sup>796</sup> *Idem* at para 501.

<sup>797</sup> *Idem* at para 502.

<sup>798</sup> *Idem* at paras 112 – 113.

which related to events that occurred in mid-2006, three years after the Bogoro attack occurred. The Trial Chamber suggested that testimony of witnesses and forensic findings to identify victims in the *loci in quo* should have been obtained soon after the event in question. The prosecution's failure to obtain such evidence led it to having to rely on witnesses' statements and reports prepared by MONUC investigators and NGOs.<sup>799</sup> The Trial Chamber also pointed out that the prosecution should have visited the accused's home and the areas around Bogoro, which would have given the prosecution a better understanding of its case, and would have helped them to verify witness testimonies.<sup>800</sup> Thirdly, the Chamber stated that the prosecution should have obtained evidence statements from certain commanders who had played a key role before, during and after the attack.<sup>801</sup> Lastly, the Trial Chamber pointed out that a statement obtained from the accused during investigation would have helped the prosecution distinguish unreliable evidence.<sup>802</sup> The Trial Chamber, however, appreciated the difficulties involved in conducting an investigation in a conflict-affected area. It subsequently, added that the prosecution should have obtained a thorough analysis of the marital status and education history of its witnesses, as this would have helped enhance their credibility.<sup>803</sup>

The Prosecutor appealed on three grounds.

1. The Trial Chamber erred in law by misapplying the standard of proof, that is, the beyond reasonable [doubt] standard. The prosecutor submitted that the Trial Chamber' had required proof to a degree of absolute certainty (ie beyond *any* doubt)'. [own emphasis]<sup>804</sup>
2. The Trial Chamber had erred in law by failing to take into consideration the total evidence before it; and
3. The Trial Chamber erred in procedure by violating the prosecution's right to a fair hearing.<sup>805</sup>

In considering the prosecution's grounds of appeal, the Appeals Chamber took into account article 83(2) of the Rome Statute, the relevant part of which provides that:

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<sup>799</sup> *Idem* at para 117.

<sup>800</sup> *Idem* at para 118.

<sup>801</sup> *Idem* at para 119.

<sup>802</sup> *Idem* at para 120.

<sup>803</sup> *Idem* at para 121.

<sup>804</sup> *Prosecutor v Mathieu Ngudjolo Chui* 'Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute"' ICC-01/04-02/12 A, (7 April 2015) para 42. Judge Ekaterina Trendafilova and Judge Cano Tarfusser dissented.

<sup>805</sup> *Idem* para 296.

If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

Regarding the first ground of appeal, the Appeals Chamber concluded that the prosecutor did not establish that the Trial Chamber had not applied the correct standard of proof beyond reasonable doubt or had applied ‘a standard that was too exacting’.<sup>806</sup> The Appeals Chamber also rejected the second ground of appeal, as the prosecutor had not established error by the Trial Chamber that would have made its approach unreasonable.<sup>807</sup> By way of example, in finding the testimony of witness P-250 unreliable it was not *per se* unreasonable for a Trial Chamber to ‘reject potentially corroborative evidence when making its credibility assessments’.<sup>808</sup> With regard to the third ground, that the Trial Chamber had made procedural errors, it concluded that these errors did not have a material impact on the decision to acquit Ngudjolo.<sup>809</sup> The Appeals Chamber thus, confirmed the Trial Chamber’s decision, holding ‘that the acquittal was not materially affected by an error of fact, law or procedure’.<sup>810</sup>

#### **4.2.2.3 Germain Katanga trial.**

The liability of Katanga as an accessory under article 25(3)(d)(ii) of the Rome Statute was held by the Chamber to be ‘contingent on the existence of a principal’,<sup>811</sup> and he only incurred criminal responsibility for crimes which ‘formed part of the common purpose and to which he contributed’.<sup>812</sup> Thus, Katanga’s actions must ‘be connected to the commission of the crime’.<sup>813</sup>

Article 25(3)(d)(ii) of the Rome Statute provides that:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

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<sup>806</sup> *Idem* para 126.

<sup>807</sup> *Idem* paras 205 and 229.

<sup>808</sup> *Idem* para 170.

<sup>809</sup> *Idem* para 294.

<sup>810</sup> *Idem* para 296.

<sup>811</sup> *Prosecutor v Germain Katanga* ‘Judgment pursuant to article 74 of the Statute’ ICC-01/04-01/07 (7 March 2014) para 1385.

<sup>812</sup> *Idem* at para 1619 and 1612.

<sup>813</sup> *Idem* at para 1632.

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting within a common purpose. Such contribution shall be intentional and shall:

(ii) Be made in the knowledge of the intention of the group to commit the crime.

Thus, five constituent elements must be established beyond reasonable doubt under article 25(3)(d)(ii), for the Trial Chamber to find Katanga criminally responsible for the crimes charged under this article. These elements are that:

1. A crime within the jurisdiction of the Court was committed;
2. The persons who committed the crime belonged to a group acting with a common purpose;
3. The accused made a significant contribution to the commission of the crime;
4. The contribution was intentional; and
5. The accused's contribution was made in the knowledge of the intention of the group to commit the crime.<sup>814</sup>

The majority Chamber convicted Katanga<sup>815</sup> as an accessory under article 25(3)(d) of the Rome Statute for the crime of murder as a crime against humanity, and the crimes of murder, attacking a civilian population and the destruction of property and pillaging as war crimes in the attacks, which occurred on Bogoro village on 24 February 2013. They found that these crimes were part of the combatants' common purpose.<sup>816</sup> Katanga's conviction as an accessory to these crimes was, based on the significant role he played in facilitating these crimes, which formed part of the common purpose, although he was not present when the attack took place. He had intentionally contributed to the commission of these crimes, knowing that the combatants intended to commit them.<sup>817</sup>

The Trial Chamber unanimously acquitted Katanga of the crimes of rape and sexual slavery as crimes against humanity and war crimes under article 25(3)(d) of the Rome Statute, and also of using child soldiers as a war crime under article 25(3)(a) of the same statute.<sup>818</sup> The acquittal was based on lack of evidence that these crimes had been committed on a wide scale and repeatedly on the day in question, or that the destruction of Bogoro led to the commission of these crimes.<sup>819</sup> The Trial Chamber found that the prosecution had not established that the

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<sup>814</sup> *Idem* at para 1619.

<sup>815</sup> Judge Christine van den Wyngaert delivered a partially dissenting judgment.

<sup>816</sup> *Prosecutor v Germain Katanga* 'Judgment pursuant to article 74 of the Statute', paras 1658, 1661 and 1662.

<sup>817</sup> *Idem* at paras 1670 – 1691.

<sup>818</sup> *Idem*.

<sup>819</sup> *Idem* at para 1663.

combatants committed these crimes before destroying Bogoro,<sup>820</sup> and adverted to the fact that women who were raped, abducted and enslaved had their lives spared because they claimed to belong to a non-Hema ethnicity.<sup>821</sup> The Chamber further stated that ‘although the acts of rape and enslavement formed an integral part of the militia’s design to attack the predominantly Hema civilian population of Bogoro’, it could not ‘find, on the basis of the evidence put before it, that the criminal purpose pursued on 24 February 2003 necessarily encompassed the commission of the specific crimes proscribed by articles 7(1)(g) and 8(2)(e)(vi) of the Statute’.<sup>822</sup> As a result, the Trial Chamber held that the evidence did not prove that the acts of rape and sexual slavery were part of the common purpose of the combatants.<sup>823</sup> As mentioned above, the Trial Chamber had to be satisfied beyond reasonable doubt that Katanga belonged to a group acting with a common purpose. As the prosecution could not establish that the combatants had a common purpose to rape and inflict sexual slavery, Katanga could not be found belonging to a group acting with a common purpose.

#### **4.2.2.4 Germain Katanga’s sentencing**

Katanga was sentenced to 12 years imprisonment. The time, spent in the ICC’s detention centre (between 18 September 2007 and 23 May 2014), was deducted from his sentence.<sup>824</sup> Katanga discontinued the appeal against conviction he lodged with the Appeals Chamber on 25 June 2014, attaching a declaration to the notice of discontinuance that he accepted the Chamber’s conclusion as to his role and conduct in the Bogoro attack, and also expressed his sincere regret to those affected by his conduct.<sup>825</sup> The prosecutor withdrew her appeal against Katanga’s acquittal for rape and sexual slavery, as well as sentence, as lacking sufficient grounds for success before the Appeals Chamber. She was satisfied with Katanga’s ‘acceptance of the conclusions reached in the article 74 judgment as to his role and conduct, as well as the sentence imposed’, and his ‘expression of sincere regret to all those who have suffered as a result of his

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<sup>820</sup> *Ibid.*

<sup>821</sup> *Ibid.*

<sup>822</sup> *Idem* at para 1664.

<sup>823</sup> *Idem* at paras 1664 and 1693.

<sup>824</sup> *Idem* at paras 170 – 171.

<sup>825</sup> *Prosecutor v Germain Katanga* ‘Defence notice of discontinuance of appeal against the “*judgment rendu en application de l’article 74 du statut*” rendered by Trial chamber II on 7 April 2014’ (25 June 2014) ICC-01/04-01/07.

conduct, including the victims of Bogoro'.<sup>826</sup> The legal representative of victims and various other interested bodies viewed the prosecutor's withdrawal of the appeal with disappointment.<sup>827</sup> The withdrawal represents another indication of prosecutors' reluctance to pursue a conviction for possible crimes of SGBV, especially when they are satisfied with convictions for other crimes.

Pursuant to article 110 of the Rome Statute,<sup>828</sup> three judges of the Appeals Chamber reviewed Katanga's sentence, on 15 November 2015 and reduced his sentence by three years and eight months. His imprisonment ended on 18 January 2016.<sup>829</sup> Katanga is presently facing trial for other crimes in the DRC, relating to 'war crimes, crimes against humanity and participation in an insurrectional movement' in the Ituri region of the DRC.<sup>830</sup>

#### **4.2.2.5 The need to investigate and formulate cases properly**

The *Ngudjolo and Katanga* cases shows how ineffective investigation carried out by the OTP resulted in weak evidence from which acquittals of the accused for crimes of SGBV resulted. The ICC judges expressed their displeasure at the OTP's investigations. In *Katanga's* case, the observations made by the Trial Chamber with respect to Ngudjolo were along the same lines.<sup>831</sup>

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<sup>826</sup> *Prosecutor v Germain Katanga* 'Notice of discontinuance of prosecution's appeal against the article 74 judgment of conviction of Trial chamber II dated 7 March 2014 in relation to Germain Katanga' (25 June 2014) ICC-01/04-01/07.

<sup>827</sup> Global Justice 'Victims disappointed as prosecution and defence drop Katanga appeals' available at [www.coalitionfortheicc.org/.../victims-disappointed-prosecution-and-defence-drop-ka](http://www.coalitionfortheicc.org/.../victims-disappointed-prosecution-and-defence-drop-ka) (accessed on 25 July 2016).

<sup>828</sup> Rome Statute, art 110 provides for the review by the ICC concerning a reduction of sentence. In Katanga's case, since he had served two thirds of his sentence on 18 September 2005, his sentence had to be reviewed. Article 110(3) provides that:

[w]hen the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

In such a situation, article 110(4) provides what factors the ICC judges should take into account, when considering a reduction in a convicted person's sentence. Rule 223 of the Rules of Procedure and Evidence provides the criteria, which should be taken into account by the judges of the ICC.

<sup>829</sup> *Prosecutor v Germain Katanga* 'Decision on the review concerning reduction of sentence of Mr. Germain Katanga' (13 November 2015) ICC-01/04-01/07.

<sup>830</sup> *Yahoo News* 'Ex-warlord Katanga back on trial for war crimes in DR Congo' (6 May 2016) available at <https://www.yahoo.com/news/ex-warlord-katanga-back-trial-war-crimes-dr-192549793.html> (accessed on 25 July 2016).

<sup>831</sup> *Prosecutor v Mathieu Ngudjolo Chui* 'Judgment pursuant to article 74 of the Statute' at paras 117 -120. *Prosecutor v Germain Katanga* 'Judgment pursuant to article 74 of the Statute' at paras 59 – 62.

Therefore, Katanga's acquittal of SGBV was not surprising, given that the prosecutor used the same evidence as in the case in which *Ngudjolo* was acquitted.<sup>832</sup>

Although the inclusion of gender-sensitive provisions in the Rome Statute was due to the lessons learnt from previous tribunals, such as the mistakes made by the ICTR in its investigation and prosecution of SGBV,<sup>833</sup> the ICC repeated the mistakes of those tribunals. The flaws in the OTP's investigation, for example, were due to insufficient planning<sup>834</sup> and short-focused scrutiny.<sup>835</sup> The OTP's low-cost approach in its investigations in situation states resulting in its minimal field presence, and its preference for intermediaries over its own staff and failure to develop a partner-based relationship with them were problematic. Ultimately, staff were overburdened and the use of inexperienced investigators, who were nationals of these situation states, compounded the problem.<sup>836</sup> In particular, sexual and gender-based cases such as in the *Njudjolo* case have highlighted the importance of obtaining forensic medical evidence to strengthen the prosecution's case<sup>837</sup> – not easily obtained due to the stigma attached to such crimes. The OTP's concern for its safety in war-torn areas this has hindered it from obtaining quality evidence.<sup>838</sup>

The ICC's nine strategic goals for 2016 to 2018 included the OTP improving the quality of its preliminary examinations, investigations and prosecutions, showing that it has taken into consideration previous mistakes made.<sup>839</sup> The areas, which the OTP has given priority to, are:

1. Closing the time gap between events on the ground and the office's investigations by creating partnerships with first responders, creating a gateway for crime reporting and working with partners to preserve relevant information on the internet.
2. Increasing its ability to collect different forms of evidence other than witness statements through continually enhancing its scientific and technology-related capabilities. Additionally, it

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<sup>832</sup>DR Congo massacre may alter international law available at <http://www.Aljazeera.com/indepth/features/2014/02/dr-congo-massacre-may-alter-international-law-2014215122427499229.html> (accessed 17 March 2016).

<sup>833</sup> Oosterveld 'Gender-sensitive justice and The International Criminal Tribunal for Rwanda' at 125-126.

<sup>834</sup> Sacouto and Cleary 'The Importance of effective investigation of sexual violence and gender-based crimes at the International Criminal Court' at 341-342.

<sup>835</sup> Christian M De Vos 'Investigating from afar: The ICC's Evidence Problem' (2013) 26 *Leiden Journal of International Law* 1009 at 1011.

<sup>836</sup> See generally *Idem* at 1009 - 1024

<sup>837</sup> Sucharita S K Varansi and Kelly Blenhoff 'Regardless of outcome, Katanga verdict will be a significant step forward' available at <http://www.physiciansforhumanrights.org>Blog> (accessed 17 March 2016).

<sup>838</sup> Vos 'Investigating from afar: The ICC's Evidence Problem' at 1019.

<sup>839</sup> ICC-OTP, Strategic Plan| 2016-2018 (6 July 2015) para 55 available at [https://www.icc-cpi.int/.../070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/.../070715-OTP_Strategic_Plan_2016-2018.pdf) (accessed 11 November 2016).



will develop further partnerships to support this strategic need, so that in-house capacity is only developed where it is justified.

3. Continuing to strengthen the Office's analysis function through the further roll-out of the Factual Analytical Database, the upgrade of analytical software, the roll-out of the Gender Analysis, and through strengthening the use of analytical products in investigative decision-making for planning, case selection and case review.

4. Enhancing the financial investigative capabilities.

5. Continuing to review investigative standards and to develop certification possibilities for staff.

6. Continuing to increase the Office's investigative field presence.'<sup>840</sup>

### 4.2.3 The Callixte Mbarushimana Case.

In contrast to the other cases relating to gender-based crimes in the Ituri region of the DRC, the case against Callixte was for crimes within the Kiva province of the DRC. A warrant was issued for Callixte's arrest on 28 September 2010 by Pre-Trial Chamber I for six counts of war crimes and five counts of crimes against humanity which occurred in the Kiva province of the DRC between January 2009 and 20 August 2010, the date of the prosecution's application for the warrant.<sup>841</sup> These crimes; were committed by the *Forces démocratiques pour la libération du Rwanda – Forces Combattantes Abacunguzi* (FDLR), of which Callixte was their *de facto* leader and first vice president for a brief period in 2010.<sup>842</sup> Callixte was charged with being criminally responsible for these crimes under article 25(3)(d) of the Rome Statute<sup>843</sup> in that he 'knowingly and intentionally contributed 'in any other way' ie in a way other than the ones listed in article 25(3)(a),(b) and (c) of the Statute, to the commission of the war crimes and crimes against humanity.'<sup>844</sup> Both the war crimes and crimes against humanity counts contained charges of rape and other gender-based crimes such as torture in the form of genital mutilation.<sup>845</sup> On 11 October 2010 Callixte was arrested French authorities in France, where he was a refugee.<sup>846</sup> He was subsequently, transferred to the ICC detention centre on 25 January 2011.<sup>847</sup> At the confirmation of charges hearing from 16 to 21 September 2011 a majority of the Pre-Trial Chamber, whilst concluding that whilst there were 'substantial grounds to believe that acts amounting to war

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<sup>840</sup> *Ibid.*

<sup>841</sup> *Prosecutor v Callixte Mbarushimana* 'Warrant of arrest for Callixte Mbarushimana' ICC-01/04-01/10 (28 September 2010).

<sup>842</sup> *Idem* at para 8.

<sup>843</sup> *Idem.*

<sup>844</sup> *Prosecutor v Callixte Mbarushimana* 'Decision on the confirmation of charges' ICC-01/04-01/10 (16 December 2011) para 8.

<sup>845</sup> *Idem* at paras 123 and 129.

<sup>846</sup> The warrant of arrest issued against Callixte was unsealed on 11 October 2010.

<sup>847</sup> *Prosecutor v Callixte Mbarushimana* 'Decision on the confirmation of charges' at para 15.

crimes were committed on 5 out of the 25 occasions alleged by the Prosecution’, declined to confirm the charges against Callixte.<sup>848</sup> The Pre-trial Chamber declined to confirm the charges of rape as a war crime in Manje as based on hearsay evidence of a Human Rights Watch Report.<sup>849</sup> Even though this was the only piece of evidence which could not be corroborated, the Chamber held that it was insufficient ‘to establish substantial grounds to believe that rape under article 8(2)(e)(vi) of the Statute was committed during the attack in Manje’.<sup>850</sup> Charges of rape in Mianga were not confirmed for the same reason, namely that the evidence of the witness who testified to the commission of rape was hearsay and could not be corroborated.<sup>851</sup>

Furthermore, the contextual elements of crimes against humanity had not been satisfied, taking into account all the evidence and ‘the several discrepancies between the prosecution’s allegations and the evidence submitted’.<sup>852</sup> It then held that it was not satisfied that ‘the threshold of substantial grounds to believe that the FDLR pursued the policy of attacking the civilian population’ had been met.<sup>853</sup> It also noted ‘that the policy alleged by the prosecution to create a “humanitarian catastrophe” could not be inferred to the requisite threshold, of War Crimes’.<sup>854</sup> Consequently, the evidence submitted was not sufficient for it ‘to be convinced, to the threshold of substantial grounds to believe, that such acts were part of a course of conduct amounting to “an attack directed against the civilian population”, within the meaning of article 7 of the Statute’.<sup>855</sup> The Pre-Trial Chamber noted the importance of the prosecution clearly stating the contents of the charges and statement of facts brought against an accused and the effect of failing to do so. ‘The charges and the statements of facts in the Document Containing the Charges’ had ‘been articulated in such vague terms that the Chamber had serious difficulties in determining, or could not determine at all, the factual ambit of a number of the charges’.<sup>856</sup> For example the prosecution failed to clearly characterise certain SGBCs – crimes of violent attacks, which were charged as, ‘rape, torture and mutilation and other forms of sexual violence, forcing family members to witness the perpetration of rape, sexual violence and atrocities on their loved ones

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<sup>848</sup> *Idem* para 264.

<sup>849</sup> *Ibid.*

<sup>850</sup> *Idem* at para 194.

<sup>851</sup> *Idem* at paras 220 -221.

<sup>852</sup> *Idem* para 263.

<sup>853</sup> *Ibid.*

<sup>854</sup> *Ibid.*

<sup>855</sup> *Idem* para 264.

<sup>856</sup> *Idem* para 110.

and an incident in which a number of women were allegedly captured, raped, tortured and killed by the FDLR'.<sup>857</sup> The Chamber also expressed displeasure at the techniques used in the OTP's investigations as being unprofessional and impartial when questioning witnesses, which affected the probative value of the evidence.<sup>858</sup> The techniques were contrary to the provisions of the Rome Statute which provided for the use of appropriate measures 'to ensure the effective investigation and prosecution of crimes'.<sup>859</sup> This involved giving respect to 'the interests and personal circumstances of victims and witnesses, including [their] gender' and taking into account 'the nature of the crime, in particular when it involves sexual violence, gender violence or violence against children'.<sup>860</sup> In addition to this, there should be respect for the rights of such persons.<sup>861</sup>

In assessing Callixte's criminal liability under article 25(3)(d) of the Rome Statute, the Chamber stated the importance of the accused making 'a significant contribution to the crimes committed or attempted'.<sup>862</sup> 'The extent of the person's contribution is determined by considering the person's relevant conduct and the context in which this conduct is performed.'<sup>863</sup> The Chamber also concluded that a '25(3)(d) liability can include contributing to a crime's commission after it has occurred, so long as this contribution had been agreed upon by the relevant group acting in common purpose with the suspect prior to the perpetration of the crime.'<sup>864</sup> The Chamber majority held that it was 'unable to be satisfied to the threshold of substantial grounds to believe that the FDLR pursued the policy of attacking the civilian population'.<sup>865</sup> It took the view that:

... based on the analysis of the evidence as a whole, there are likewise not substantial grounds to believe that the FDLR leadership constituted "a group of persons acting with a common purpose"

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<sup>857</sup> *Ibid.*

<sup>858</sup> *Prosecutor v Callixte Mbarushimana* 'Decision on the confirmation of charges' at para 51.

<sup>859</sup> Rome Statute, art 54(1)(b).

<sup>860</sup> *Ibid.* Also, Rome Statute, art 68(1). See also Rule 88 Rules of Procedure and Evidence which provides that: 'Taking into consideration that violations of the privacy of a witness or victim may create risks to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.'

<sup>861</sup> Rome Statute, art 54(1) (c).

<sup>862</sup> *Prosecutor v Callixte Mbarushimana* 'Decision on the confirmation of charges' at para 285. See section 4.2.2.3 above where the five constituents elements which must be proved under article 25(3)(d)(ii) are spelt out.

<sup>863</sup> *Ibid.*

<sup>864</sup> *Idem* para 287.

<sup>865</sup> *Idem* para 291.

within the meaning of article 25(3)(d) of the Statute, in particular in light of the requirement that the common purpose pursued by the group must have at least an element of criminality.<sup>866</sup>

Thus the prosecution was not able to prove that Callixte was individually responsible under article 25(3)(d) of the Rome Statute for crimes committed by the FDLR.<sup>867</sup>

The prosecutor appealed the impugned decision on four grounds, and the Appeals Chamber granted leave to appeal three of these grounds, the first two of which were ‘intrinsically connected’.<sup>868</sup> In examining these grounds, the Appeals Chamber considered ‘whether the Pre-Trial Chamber erred in finding that it may evaluate the credibility of witnesses and that it may resolve inconsistencies, ambiguities or contradictions in the evidence for the purpose of determining whether to confirm the charges against a person’. The Appeals Chamber’s found that as an issue of law the Pre-Trial Chamber could ‘evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses’ when considering the application of article 61 of the Rome Statute.<sup>869</sup> The third ground of appeal concerned the interpretation of article 25(3) (d) of the Rome Statute, under which the accused had been charged. The prosecutor submitted that the misinterpretation of this article by the Pre-Trial Chamber resulted in a misapplication of the correct legal standard which materially affected the outcome of the Pre-Trial Chamber’s decision.<sup>870</sup> This resulted in an error of law.<sup>871</sup> The Appeals Chamber held that even if it agreed with the prosecution’s submission, it would not reverse the decision, as the alleged error did not materially affect the decision.<sup>872</sup> The Appeals Chamber confirmed the Pre-Trial Chamber’s decision. Judge Fernandez de Gurmendi appended a separate opinion on the third ground of appeal.

#### **4.2.4 Bosco Ntaganda Case.**

The first warrant of arrest which was issued against Ntaganda in 2006 did not contain charges for gender-based crimes, but charges for conscripting and enlisting children of 15 years and under,

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<sup>866</sup> *Ibid.*

<sup>867</sup> *Idem* para 340.

<sup>868</sup> *Prosecutor v Callixte Mbarushimana* ‘Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”’ (30 May 2012) ICC-01/04-01/10 OA 4, paras 5 and 17.

<sup>869</sup> *Idem* at paras 46 and 70.

<sup>870</sup> *Idem* at paras 50 – 59.

<sup>871</sup> *Idem* at para 50.

<sup>872</sup> *Idem* at para 66 and 70.

and also using them as child soldiers in the Ituri region of the DRC in 2003.<sup>873</sup> The second warrant of arrest issued against Ntaganda however contained *inter alia* gender-based charges of rape and sexual slavery as war crimes and crimes against humanity.<sup>874</sup> After avoiding arrest from the ICC, the accused voluntarily surrendered to the ICC on 22 March 2013.<sup>875</sup> The hearing affirming the charges against the accused; was held from 10 to 14 February 2014<sup>876</sup> at which the charges confirmed against Ntaganda included *inter alia* charges of rape and sexual slavery against civilians as war crimes and crimes against humanity and rape and sexual slavery of child soldiers. These crimes occurred in the Ituri region, a north-eastern part of the DRC, between 2002 and 2003. This was the first time the ICC charged a commander for such crimes committed against child soldiers who were under his command.<sup>877</sup> The Pre-Trial Chamber found Ntaganda criminally responsible for these crimes according to articles 25(3)(a) and (b), article 25(3)(d) and article 28(a) of the Rome Statute.<sup>878</sup> The trial against Ntaganda, which began on 2 September 2015, has been criticised for limiting his crimes to the Ituri region, because his troops were alleged to have also committed crimes in North Kivu.<sup>879</sup>

#### 4.3 THE UGANDAN CASES

The Ugandan cases are the oldest cases before the ICC, having lain dormant for 10 years, because of the suspects being unavailable.<sup>880</sup> The decision to investigate the situation in Uganda was based on a referral by the Government of Uganda in December 2003. The Pre-Trial Chamber II granted the OTP's application for warrants of arrest against five top Lord's Resistance Army (LRA) leaders on 8 July 2005.<sup>881</sup> These arrest warrants were issued for the arrest of Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen for

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<sup>873</sup> *Prosecutor v Bosco Ntaganda* 'Warrant of arrest' (22 August 2006) ICC-01/04-02/06.

<sup>874</sup> *Prosecutor v Bosco Ntaganda* 'Decision on the Prosecutor's application under article 58' (13 July 2012) ICC-01/04-02/06.

<sup>875</sup> *Idem* at para 2.

<sup>876</sup> *Prosecutor v Bosco Ntaganda* 'Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda' (9 June 2014) ICC-01/04-02/06, para 5.

<sup>877</sup> Global Justice 'What's happening in the ICC Ntaganda trial' available at <https://ciccglojaljustice.wordpress.com/.../whats-happening-in-the-icc-ntaganda-trial/> (accessed on 25 July 2016).

<sup>878</sup> *Prosecutor v Bosco Ntaganda* 'Decision pursuant to article 61(7)(a) and (b) of the Rome Statute' at paras 36, 74 and 97.

<sup>879</sup> Human Rights Watch 'ICC: Trial of Bosco Ntaganda for Congo crimes' available at <https://www.hrw.org/news/2015/09/01/icc-trial-bosco-ntaganda-congo-crimes> (accessed on 26 July 2016).

<sup>880</sup> *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, 'Decision severing the case against Dominic Ongwen' (6 February 2015) ICC-02/04-01/05, para 8.

<sup>881</sup> See for example, 'Warrant of arrest for Dominic Ongwen', (8 July 2005) ICC-02/04. The situation in Uganda was assigned to Pre-Trial Chamber II on 5 July 2004 by the Presidency.

war crimes and crimes against humanity. The ICC terminated the case against Raska Lukwiya on 8 January 2010, following confirmation of his death.<sup>882</sup> The ICC has withdrawn the case against Kotok Odhiambo, whose death has also been confirmed.<sup>883</sup> The arrest warrants against Joseph Kony and Vincent Otti, whose deaths are not yet confirmed, are still outstanding.<sup>884</sup>

#### 4.3.1 Dominic Ongwen Case.

Ongwen's case is unique as it will be the first time that the ICC will try an accused for the gender-based violence crime of enslavement. Ongwen was the brigade commander of the Sinia Brigade of the LRA.<sup>885</sup> The warrant of arrest issued against Ongwen contained four counts of war crimes of murder, cruel treatment of civilians, intentionally directing an attack against a civilian population and pillaging, and three counts of crimes against humanity of murder, enslavement and inhumane acts of inflicting serious bodily injury and suffering, committed on or about 20 May 2004.<sup>886</sup> Ongwen was charged under article 25(3)(b) of the Rome Statute as being 'criminally responsible and liable for punishment' for soliciting or inducing the above crimes.<sup>887</sup> After years in hiding, Ongwen surrendered to ICC custody on 16 January 2015. He was transferred to the ICC's Detention Centre on 21 January 2015. The case against Ongwen and his co-accused was separated on 6 February 2015.<sup>888</sup>

The Pre-Trial Chamber II had recommended to the Presidency that the hearing be held in Uganda so as to bring the proceedings closer to the communities affected by Ongwen's acts, and also as it would contribute to a better perception of the ICC on the African continent.<sup>889</sup>

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<sup>882</sup> *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen* 'Public decision to terminate the proceedings against Raska Lukwiya' (11 July 2007) ICC-02/04-01/05.

<sup>883</sup> New Vision 'ICC withdraws arrest warrant against LRA's Okot Odhiambo' available at [www.newvision.co.ug/new\\_vision/.../icc-withdraws-arrest-warrant-lras-okot-odhiambo](http://www.newvision.co.ug/new_vision/.../icc-withdraws-arrest-warrant-lras-okot-odhiambo) (accessed on 25 July 2016).

<sup>884</sup> International Criminal Court 'Message from the Prosecutor of the International Criminal Court, Fatou Bensouda, calling for defection by the LRA fighters' available at <https://www.icc-cpi.int/Pages/item.aspx?name=160401-otp-stat> (accessed on 25 July 2016).

<sup>885</sup> Warrant of arrest for Dominic Ongwen (8 July 2005) ICC-02/04, para 10.

<sup>886</sup> *Ibid.*

<sup>887</sup> Rome Statute, art 25(3)(b).

<sup>888</sup> *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen* 'Decision severing the case against Dominic Ongwen' (6 February 2015) ICC-02/04-01/05, para 8.

<sup>889</sup> *Prosecutor v Dominic Ongwen* 'Recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda' (10 September 2015) ICC-02/04-01/15, paras 3-4. The recommendation is under rule 100(2) of the Rules of Procedure and Evidence. Rule 100(2) provides that 'An application or recommendation changing the place where the Court sits may be filed at any time after the initiation of an investigation, either by the Prosecutor, the defence or by a majority of the judges. Such an application or recommendation shall be addressed to the Presidency. It shall be made in writing and specify in which State the Court would sit. The Presidency shall satisfy itself of the views of the relevant Chamber.' Article 3(3) of the Rome Statute also provides that 'The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.'

However, the confirmation of charges hearing took place from 21 January to 22 January 2016 not in Uganda but at The Hague. If it had taken place in Uganda, it would have been the first time that the ICC had applied its positive complementarity concept, that is, ‘a proactive policy of cooperation aimed at promoting national proceedings’.<sup>890</sup> By applying this concept the OTP encourages ‘genuine national proceedings where possible, including in situation countries’.<sup>891</sup> The OTP has expanded the complementarity principle laid down in the Rome Statute by recognising positive complementarity as a second dimension to complementarity.<sup>892</sup> The first dimension is the admissibility test under Article 17 of the Rome Statute, that is, ‘how to assess the existence of national proceedings and their genuineness, which is a judicial issue’.<sup>893</sup> The Office of the President of Uganda put out a statement as to why Uganda could not try Ongwen, despite hopes that the case would be heard in Uganda. The statement read that although the Ugandan government had established ‘the International Crimes Division of the High Court which was mandated to try international crimes’, Ongwen had to be tried by the ICC as his offences were cross-border offences.<sup>894</sup> It also stated that Uganda had already referred the situation concerning the LRA to the ICC.<sup>895</sup> This shows that although a domestic court may be established to try international crimes within the ICC’s jurisdiction, other factors have to be taken into consideration as to why it would not be feasible to try these crimes at a domestic level. As the number of charges against Ongwen multiplied from seven to 70 counts by December 2015, the Pre-Trial Chamber II confirmed the charges on 23 March 2016.<sup>896</sup> The war crimes charges were rape, outrages upon personal dignity, sexual slavery, cruel treatment and torture, whilst the crimes against humanity charges included rape, torture, enslavement, sexual slavery, forced marriage as an inhumane act, persecution and other inhumane acts.<sup>897</sup> The Pre-Trial Chamber was differently constituted to the Pre-Trial Chamber in the Bemba case, and held a

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<sup>890</sup> ICC-OTP, Prosecutorial Strategy 2009-2012, (1 February 2010), para 16.

<sup>891</sup> *Idem* para 17.

<sup>892</sup> *Idem* para 16.

<sup>893</sup> *Ibid.*

<sup>894</sup> See Office of the President, Republic of Uganda, ‘Statement by the Government on the Dominic Ongwen case’ available at <https://www.mediacentre.go.ug/.../statement-government-dominic-ongwen-case> (accessed on 25 July 2016). The statement was written by Uganda’s Attorney General, Hon Peter Nyombi (MP) on 2 February 2015. The crimes committed by the LRA are not limited to Uganda, but also extends to South Sudan, northeastern Democratic Republic of Congo and the Central African Republic.

<sup>895</sup> *Ibid.*

<sup>896</sup> *Prosecutor v Dominic Ongwen* ‘Decision on the confirmation of charges against Dominic Ongwen’ (23 March 2016) ICC-02/04-01/15.

<sup>897</sup> *Ibid.*

different view regarding the application of article 61(7) and cumulative charging. The Chamber held that article 61(7) of the Rome Statute mandated the Chamber:

[t]o decline to confirm charges only when the evidence does not provide substantial grounds to believe that the person committed the charged crime and not when one possible legal characterisation of the relevant facts is to be preferred over another, equally viable. When the Prosecutor meets the applicable burden of proof, the Chamber shall confirm the charges as presented.<sup>898</sup>

The Chamber in effect was agreeing with the prosecution's argument in *Bemba's* case.<sup>899</sup> In other words, the Pre-Trial Chamber must confirm charges when the prosecution has met the applicable burden of proof. Declining charges should not be on the grounds that a 'possible legal characterisation of the relevant facts is . . . preferred over another'.<sup>900</sup>

With regard to cumulative charging, the Pre-Trial Chamber rejected the argument of the defence that 'cumulative charging should be avoided as there exists the possibility to "re-characterise crimes at trial"'.<sup>901</sup> Though it agreed with the 'distinct legal element' principle regarding cumulative charging, the Pre-Trial Chamber differed from the Bemba Pre-Trial Chamber regarding the requirements of regulation 55.

The Pre-Trial Chamber stated that:

Regulation 55 provides for a procedural remedy to situations in which the evidence heard at trial warrants a modification to the legal characterisation of the facts confirmed by the Pre-Trial Chamber. This provision does not address or otherwise concern situations in which the same set of facts could constitute simultaneously more than one crime under the Statute, i.e. those situations warranting cumulative charging or cumulative convictions.<sup>902</sup>

The Pre-Trial Chamber confirmed all 70 counts against Ongwen on 23 March 2016.<sup>903</sup> The trial began on 6 December 2016.

#### 4.4 THE CENTRAL AFRICAN REPUBLIC CASE

The President of the Central African Republic (CAR) referred the situation in CAR to the OTP, on 21 December 2004, to investigate crimes within the ICC's jurisdiction which had been committed in CAR since 1 July 2002. Based on the Prosecutor's letter, dated 22 December 2004,

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<sup>898</sup> *Prosecutor v Dominic Ongwen* 'Decision on the confirmation of charges against Dominic Ongwen' at para 30.

<sup>899</sup> See discussion on Bemba below.

<sup>900</sup> *Prosecutor v Dominic Ongwen* 'Decision on the confirmation of charges against Dominic Ongwen' at para 30.

<sup>901</sup> *Ibid.*

<sup>902</sup> *Idem* at para 31.

<sup>903</sup> *Ibid.*



informing the ICC of the referral by President Bozize of the CAR, the CAR's situation was assigned by the Presidency of the ICC to Pre-Trial Chamber III.<sup>904</sup> Meanwhile, the Pre-Trial Chamber III was dissolved on 19 March 2009 by the Presidency, which then assigned the situation in CAR to the Pre-Trial Chamber II.<sup>905</sup>

#### **4.4.1 Jean-Pierre Bemba Case.**

##### **4.4.1.1 The Prosecution's charges against Bemba.**

A warrant for the arrest of Bemba; was issued by Pre-Trial Chamber III on 23 May 2008 for the crimes of rape, torture, outrages upon personal dignity and pillaging as war crimes, and rape and torture as crimes against humanity.<sup>906</sup> These crimes were alleged to have been committed when Bemba led his militia group known as *Movement de Liberation du Congo* (MLC), to assist President Ange-Felix Patasse, who was the President of CAR at that time, to fight an armed conflict against a rebel movement led by Francoss Bozize.<sup>907</sup> The armed conflict took place between 26 October 2002 and 15 March 2003. Belgian authorities arrested Bemba on 24 May 2008. A second warrant of arrest issued on 10 June 2008 replaced the previous warrant of arrest. The second arrest warrant not only maintained the same charges and facts contained in the previous arrest warrant, but also included two additional counts of murder characterised as a war crime and a crime against humanity.<sup>908</sup> Thereafter, Bemba was handed over to the ICC by the Belgian authorities on 3 July 2008.<sup>909</sup>

##### **4.4.1.2 The Confirmation of Charges Hearing.**

Following the confirmation of charges hearing, held between 12 January and 15 January 2009, the Chamber on 3 March 2009 requested the prosecutor to consider including an article 28 mode of criminal responsibility charge against the accused, which provision refers to a military

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<sup>904</sup> Situation in The Central African Republic, Decision assigning the situation in The Central African Republic to Pre-Trial Chamber III (19 January 2005) ICC-01/05.

<sup>905</sup> Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation (19 March 2009) ICC-Pres-01-09. Just over a month later, the Presidency had to re-constitute Pre-Trial Chamber II, following the death of one of its judges. Decision reconstituting Pre-Trial Chamber II (29 April 2009) ICC-Pres-02-09.

<sup>906</sup> *Prosecutor v Jean-Pierre Bemba Gambo* 'Warrant of arrest for Jean-Pierre Bemba Gambo' (23 May 2008) ICC-01/05-01/08. *Prosecutor v Jean-Pierre Bemba Gambo* 'Judgment pursuant to article 74 of the Statute' (21 March 2016) ICC-01/05-01/08, para 5.

<sup>907</sup> *Idem* paras 9 and 17.

<sup>908</sup> *Prosecutor v Jean-Pierre Bemba Gambo* 'Warrant of arrest for Jean-Pierre Bemba Gambo replacing the warrant of arrest issued on 23 May 2008' (10 June 2008) ICC-01/05-01/08.

<sup>909</sup> *Prosecutor v Jean-Pierre Bemba Gambo* 'Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gambo' (15 June 2009) ICC-01/05-01/08, para 4.

commander or superior's responsibility.<sup>910</sup> The prosecutor accordingly filed an amended Document Containing the Charges on 30 March 2009 with other amended documents,<sup>911</sup> adding an article 28 mode of criminal responsibility as an alternative to the primary article 25(3)(a) mode of criminal responsibility.<sup>912</sup> The charges contained in the arrest warrant of 10 June 2008 were retained. In its decision on the confirmation hearing given on 15 June 2009, the Pre-Trial Chamber II confirmed charges of Bemba being criminally responsible as a superior under article 28(a) of the Rome Statute, for murder as a crime against humanity and war crime, rape as a crime against humanity and war crime, and pillaging as a war crime.<sup>913</sup>

Article 28 of the Rome Statute provides:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

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<sup>910</sup> *Idem* paras 12 and 15. *Prosecutor v Jean-Pierre Bemba Gambo* 'Judgment pursuant to article 74 of the Statute' (21 March 2016) ICC-01/05-01/08, para 6.

<sup>911</sup> *Idem* para 17.

<sup>912</sup> *Prosecutor v Jean-Pierre Bemba Gambo* 'Prosecution's submission of Amended Document Containing the Charges, amended list of evidence and amended in-depth analysis chart of incriminatory evidence (30 March 2009) ICC-01/05-01/08, paras 9 and 11. The other amended documents filed were an amended list of evidence and an amended related in-depth analysis chart of the evidence. *Prosecutor v Jean-Pierre Bemba Gambo* 'Judgment pursuant to article 74 of the Statute' (21 March 2016) ICC-01/05-01/08, para 7.

<sup>913</sup> *Prosecutor v Jean-Pierre Bemba Gambo* 'Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gambo' para 444.

Thus, article 28(a) of the Rome Statute provides for liability of a military commander who either ‘knew’ or ‘should have known’ that his ‘forces were committing or about to commit’ the crimes being charged.<sup>914</sup> The Chamber found that there was sufficient evidence to establish that Bemba ‘knew about the occurrence of the crimes’ committed during the period in question.<sup>915</sup> As a consequence, the ‘should have known’ requirement of article 28(a) of the Rome Statute was not considered by the Pre-Trial Chamber. The Pre-Trial Chamber declined to confirm the criminal responsibility of the accused under articles 25(3) (a) and 28(b) of the Rome Statute.<sup>916</sup>

The Chamber declined to confirm the charges of torture as a crime against humanity and war crime, and outrages upon personal dignity as a war crime under article 28(a) of the Rome Statute.<sup>917</sup> In the Amended Document Containing the Charges the crimes of torture as a crime against humanity and outrages upon personal dignity, as a war crime; were cumulatively charged by the prosecutor with that of rape. The Chamber rejected this cumulative charging approach. Applying a restrictive interpretation to these crimes, the Chamber found that the prosecutor’s evidence relating to both crimes exhibited the same conduct as that of rape, and thus concluded that both these crimes were ‘fully subsumed by the count of rape, which was the most appropriate legal characterisation of the conduct presented’.<sup>918</sup> The Chamber differentiated between the definition of torture as a crime against humanity and torture as a war crime by stating that ‘the definition of torture as a crime against humanity, unlike the definition of torture as a war crime, does not require the additional element of a specific purpose’.<sup>919</sup> In addition, the Chamber stated that ‘the specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person, are also the inherent specific material elements of the act of rape. However, the act of rape requires the additional specific material element of penetration, which makes it the most appropriate legal characterisation in this particular case’.<sup>920</sup>

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<sup>914</sup> Rome Statute, art 28(a).

<sup>915</sup> *Prosecutor v Jean-Pierre Bemba Gambo* ‘Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gambo’ para 489.

<sup>916</sup> *Idem* para 344.

<sup>917</sup> *Ibid.*

<sup>918</sup> *Idem* paras 190, 205, 302, 310 and 312.

<sup>919</sup> *Idem* at para 195.

<sup>920</sup> *Idem* at para 204.

The Chamber also found the term ‘other forms of sexual violence’, which the prosecutor used in characterising the crime of torture as a crime against humanity,<sup>921</sup> was not qualified in the Amended Document Containing the Charges by the other acts of torture apart from those of rape he was relying on.<sup>922</sup> The Pre-Trial Chamber also stated, that the method by which these acts of torture had been committed was not stated in the Amended Document Containing the Charges; it was only by examining the disclosed evidence that the Pre-Trial Chamber was able to identify the acts and method of commission of torture on which the prosecutor was relying, and this only when the Prosecutor presented ‘at the Hearing some material facts parenthetically’.<sup>923</sup> The Chamber pointed out that it was the prosecutor’s duty to provide the Chamber with all the facts which supported the charges, as it would not give credit for such flaws.<sup>924</sup> The Chamber concluded that the material facts of ‘torture as a crime against humanity through other acts of torture’ had not been provided in the Amended Document Containing the Charges, nor their method of commission. This resulted in the Chamber declining to confirm this part of the charge relating to torture on the ground that the accused would otherwise be placed at a disadvantage in preparing his case.<sup>925</sup> The Chamber also held that the information relating to the outrage upon personal dignity charge was insufficient, as the prosecution had not specified the facts relating to this charge in the Amended Document Containing the Charges.<sup>926</sup> It was at the hearing that the factual basis of the prosecutor’s case was unveiled, when he unfolded seven groups of facts, on which he was relying.<sup>927</sup>

Though the Pre-Trial Chamber declined to confirm the count of torture as a crime against humanity, and outrages upon personal dignity as a war crime, due to the cumulative charging approach used by the prosecution, it recognised that various national courts and international tribunals had applied the cumulative charging approach in certain circumstances.<sup>928</sup> The Pre-Trial

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<sup>921</sup> The count of torture as a crime against humanity was framed as torture ‘through acts of rape or other forms of sexual violence.’ *Idem* para 197.

<sup>922</sup> *Idem* paras 206 and 207.

<sup>923</sup> *Idem* para 208.

<sup>924</sup> *Ibid.*

<sup>925</sup> *Idem* at para 209.

<sup>926</sup> *Idem* at paras 307 and 309.

<sup>927</sup> *Idem* at para 308.

<sup>928</sup> *Idem* at para 200. An example of one of the cases referred to by the Chamber was the case of *Prosecutor v Delalic et al*, which was heard by the ICTY’s Appeals Chamber. In the *Prosecutor v Delalic et al* case the Appeals Chamber in allowing multiple charges held that:

Reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory

Chamber II, however, pointed out the undue burden, which the cumulative charging approach placed on the accused. The Chamber and stated that:

As a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.<sup>929</sup>

The Chamber further pointed out, that the provisions of regulation 55 of the Regulations of the Court, allowed a Trial Chamber to change the legal characterisation of a crime not provided for in the legal framework of the *ad hoc* tribunals. Due to this power given to the ICC by its judges, the Pre-Trial Chamber II was of the opinion that a cumulative charging approach was not necessary.<sup>930</sup>

With regard to non-confirmation of the charge of torture as a war crime, the Pre-Trial Chamber held that ‘the prosecutor failed to provide the factual basis in the Amended Document Containing the Charges underpinning the charge of torture as a war crime’.<sup>931</sup> Furthermore, the prosecutor’s failure at the hearing to ‘elaborate on the specific intent of alleged MLC soldiers which would have clearly characterised the alleged acts of torture as a war crime’, placed the accused at a disadvantage in preparing his case.<sup>932</sup> The Pre-Trial Chamber II reiterated the fact, that the Chamber did not have a duty to correct flaws in the prosecution’s case.<sup>933</sup>

#### **4.4.1.3 The Prosecutor’s appeal against the Pre-Trial Chamber’s decision**

The prosecutor, on 22 June 2009, applied for leave to appeal against the Pre-Trial Chamber’s decision of 15 June 2009, pursuant to article 82(1)(d) of the Rome Statute, which provides that either party may appeal:

[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or

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provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

The Appeals Chamber went on to state that where the test was not met, ‘the Chamber must decide in relation to which offence it will enter a conviction.’ *Prosecutor v Delalic et al* (Appeals Chamber Judgment) Case No. IT-96-21-A, 20 February 2001, paras 412 – 413.

<sup>929</sup> *Prosecutor v Jean-Pierre Bemba Gambo* ‘Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gambo’ para 202.

<sup>930</sup> *Idem* at para 203.

<sup>931</sup> *Idem* at para 299.

<sup>932</sup> *Ibid.*

<sup>933</sup> *Idem* at para 300.

Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Leave to appeal was granted on two grounds. The first was that the Pre-Trial Chamber did not have authority to refuse to confirm the charge of torture as a crime against humanity and the charge of outrages against personal dignity as a war crime. This was because these two charges were ‘cumulative of rape charges’ and, whether these two crimes were ‘either objectively as a matter of law or in particular based on the facts alleged. . . , they were wholly subsumed within rape charges’.<sup>934</sup> The Chamber had misapplied the relevant principles relating to each offence, since it failed to analyse whether each offence required ‘a material legal element not contained in the other’.<sup>935</sup> In explaining how the elements of rape as a crime against humanity differed from that of torture as a crime against humanity, the prosecution stated that in securing a conviction for rape, it did not need to prove that the victim had to endure ‘a certain quantum of pain or suffering’.<sup>936</sup> Also regarding a torture, it did not have to prove that such a victim endured ‘a physical invasion of a sexual nature’. By example, a man who was forced to watch his wife repeatedly raped would not be the victim of rape, but of torture.<sup>937</sup> ‘Men, women and children were raped by multiple MLC perpetrators in their homes, raped in front of family members, forced to watch rapes of family members, and raped in public locations.’<sup>938</sup> There were also lootings, rapes and murders by MLC troops who punished rebel sympathisers. The prosecutor gave as an example of torture as a crime against humanity a victim who was forced to watch his four daughters and wives raped by MLC soldiers.<sup>939</sup> The prosecution recommended that the applicable test which the Court should apply to cumulative crimes, was:

if the victim is the same in both offences and the facts overlap, or whether it should be based on the traditional examination of the provisions, to determine if the crimes contain different and separate elements and protect distinct and separate interests.<sup>940</sup>

Another argument advanced by the prosecutor was that victims would be denied a fair hearing if ‘the full range of their suffering and victimisation [was not] reflected in the charges’.<sup>941</sup> In

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<sup>934</sup> *Prosecutor v Jean-Pierre Bemba Gambo* ‘Prosecutions application for leave to appeal the decision pursuant to article 61(7)(a) and (b) on the charges against Jean-Pierre Bemba’ (22 June 2009) ICC-01/05-01/08, para 8.

<sup>935</sup> *Idem* at para 17.

<sup>936</sup> *Ibid.*

<sup>937</sup> *Ibid.*

<sup>938</sup> *Idem* at para 34.

<sup>939</sup> *Ibid.*

<sup>940</sup> *Idem* at para 18.

<sup>941</sup> *Idem* at para 23.

addition, this would exclude certain victims from giving evidence and exclude the seeking of evidence, from victims such as those who were forced to watch their family members raped.<sup>942</sup>

The prosecutor's second ground of appeal, related to whether the Pre-Trial Chamber had authority to refuse to confirm charges where the accused was not given sufficient pre-confirmation notice but 'the Document Containing the Charges, and the In-Depth Analytical Chart gave the accused sufficient notice of the changes and the supporting facts'.<sup>943</sup>

In responding to the prosecutor's application for leave to appeal, the Office of Public Counsel for Victims (OPCV) filed its observations to the effect that it was the prosecutor's discretion and not that of the Trial Chamber to decide what charges are brought against an accused. The OPCV expressed concern *inter alia* about a situation in which many victims would be denied their right to participate in the trial [and] to express their views and concerns, as 'the victim status is linked to the charges of the case'.<sup>944</sup>

The Women's Initiatives for Gender Justice (WIGJ); an international human rights organisation, was granted leave to submit an *amicus curiae* observation, regarding the Pre-Trial Chamber's decision of 15 June 2009 relating to cumulative charging<sup>945</sup> to assist the Pre-Trial Chamber in determining the case.<sup>946</sup> The WIGJ observed *inter alia* that the Pre-Trial Chamber had applied the correct standard relating to cumulative charges, that is, the test in the *Prosecutor v Delalic case* as applied by the ICTY's Appeals Chamber. It however, observed that the test had been incorrectly applied to 'at least three categories of the witnesses' in this case.<sup>947</sup> WIGJ observed that Pre-Trial Chamber 'had applied in a too narrow fashion the cumulative charging test with regard to torture and rape' to these categories of witnesses. It had also done the same with regard to rape and the outrages upon personal dignity charge.<sup>948</sup>

The Pre-Trial Chamber II rejected the prosecutor's application for leave to appeal on 18 September 2009, on the basis that both grounds of appeal did not 'significantly affect both the

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<sup>942</sup> *Ibid.*

<sup>943</sup> *Idem* at para 8.

<sup>944</sup> *Prosecutor v Jean-Pierre Bemba Gambo* 'Decision in the Prosecutor's application for leave to appeal the "Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba"' (18 September 2009) ICC-01/05-01/08, paras 41 and 42.

<sup>945</sup> *Prosecutor v Jean-Pierre Bemba Gambo* 'Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to rule 103 of the Rules of Procedure and Evidence' (31 July 2009) ICC, para 1.

<sup>946</sup> *Idem* para 17.

<sup>947</sup> *Idem* paras 18, 25 and 27.

<sup>948</sup> *Idem* para 28.

fair and expeditious conduct of the proceedings or the outcome of the trial’.<sup>949</sup> Regarding the first ground of appeal, the Pre-Trial Chamber stated that it could not make a decision on the ‘proper interpretation of the constitutive elements of the crimes concerned and the assessment of the evidence of the case’ as these issues were not within the scope of article 82(1)(d) of the Rome Statute.<sup>950</sup> In disagreeing with the prosecution that the Pre-Trial Chamber did not have authority to decline to cumulate the charges, the Appeals Chamber held that:

[a]ccording to article 61(3) of the Statute, the Prosecutor is under an obligation to present the charges, but it is incumbent upon the Pre-Trial Chamber to delineate the scope of the trial proceedings by way of its decision pursuant to article 61(7) of the Statute, in which it evaluates the evidence and applies the law. To limit such a decision to a mere formality, barring the Chamber from one of its core functions, would run counter to the Pre-Trial Chamber’s understanding of its statutory role and mandate. The duty of the Prosecutor is to present the facts that he has investigated and to provide his view on their legal characterisation in the document containing the charges. But it is for the judges of the Pre-Trial Chamber to apply the law to those facts as presented by the Prosecutor and give the legal characterisation to those facts<sup>951</sup>

#### **4.4.1.4 The Trial Chamber’s Judgment.**

The trial against Bemba commenced on 22 November 2010.<sup>952</sup> The prosecution opened its case on 23 November 2010, whilst the defence opened its case on 14 August 2012.<sup>953</sup> A few months into the defence case, the Trial Chamber, on 21 September 2012, gave notice according to regulation 55(2) of the Regulations, to the parties and participants of its intention to modify the legal characterisation of the facts. Its reason given was to enable it

to consider in the same mode of responsibility the alternative form of knowledge contained in article 28(a)(1) of the Statute namely that owing to the circumstances at the time, the accused “should have known” that the forces under his effective command and control or under his effective authority and control, as the case may be were committing or about to commit the crimes included under the charges confirmed in the Decision on the Confirmation of Charges.<sup>954</sup>

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<sup>949</sup>*Prosecutor v Jean-Pierre Bemba Gambo* ‘Decision in the Prosecutor’s application for leave to appeal the “Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba,”’ paras 49, 86 and 87.

<sup>950</sup> *Idem* para 50.

<sup>951</sup> *Idem* para 55.

<sup>952</sup>*Prosecutor v Jean-Pierre Bemba Gambo* ‘Judgment pursuant to article 74 of the Statute’ (21 March 2016) ICC-01/05-01/08, para 10.

<sup>953</sup> *Ibid.*

<sup>954</sup>*Prosecutor v Jean-Pierre Bemba Gambo* ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court’ (21 September 2012) ICC-01/05-01/08, para 5.



The defence objected to the proposed re-characterisation by the Trial Chamber stating that it ‘would result in manifest unfairness and actual prejudice to the accused’.<sup>955</sup> On 13 December 2012, to enable the defence to prepare for a possible re-characterisation and obtain further evidence, the Trial Chamber suspended the proceedings until March 2013.<sup>956</sup> The defence however, filed a motion requesting that the Chamber to vacate the temporary suspension of proceedings.<sup>957</sup> In lifting the suspension of the proceedings on 6 February 2013, the Trial Chamber noted that the defence’s motion to vacate the proceedings was based on a misconceived allegation that the Trial Chamber had not made a ‘formal decision to amend the charges accordingly or to render a decision that regulation 55 is in fact being relied upon in the proceedings’.<sup>958</sup> The Trial Chamber stated that there was no need for a ‘formal decision to amend the charges’ as it could re-characterise the facts ‘on its own motion, “at any time during the trial”’.<sup>959</sup> In handing down its judgment on 21 March 2016, the Trial Chamber did not find that the facts warranted a re-characterisation to include the ‘should have known’ *mens rea*.<sup>960</sup> The Trial Chamber found Bemba criminally responsible under article 28(a) for the crime of rape and murder as a crime against humanity and the crime of rape, murder and pillaging as a war crime.<sup>961</sup> In finding Bemba criminally responsible under article 28(a), the Trial Chamber found sufficient evidence that the accused ‘knew that the MLC forces under his effective authority and control were committing or about to commit’ the said crimes.<sup>962</sup> Factors such as: ‘the notoriety of the crimes, Mr Bemba’s position, . . . direct knowledge of allegations of murder, rape and pillaging by MLC soldiers at specific times throughout the 2002-2003 CAR operation’ were taken into account to determine Mr Bemba’s knowledge.<sup>963</sup>

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<sup>955</sup>*Prosecutor v Jean-Pierre Bemba Gambo* ‘Defence submissions on the Trial Chamber’s notification under regulation 55(2) of the Regulations of the Court’ (18 October 2012) ICC-01/05-01/08, para 10.

<sup>956</sup>*Prosecutor v Jean-Pierre Bemba Gambo* ‘Decision on the temporary suspension of the proceedings pursuant to regulation 55(2) of the Regulations of the Court and related procedural deadlines’ (13 December 2012) ICC-01/05-01/08, para 15.

<sup>957</sup>*Prosecutor v Jean-Pierre Bemba Gambo* ‘Defence Motion to vacate Trial Chamber’s “Decision on the temporary suspension of the proceedings” of 13 December 2012 and notification regarding the envisaged re-qualification of charges pursuant to regulation 55’ (28 January 2013) ICC-01/05-01/08, para 9.

<sup>958</sup>*Prosecutor v Jean-Pierre Bemba Gambo* ‘Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions’ (6 February 2013) ICC-01/05-01/08, para 17.

<sup>959</sup>*Idem* para 16.

<sup>960</sup>*Prosecutor v Jean-Pierre Bemba Gambo* ‘Judgment pursuant to article 74 of the Statute’ para 57.

<sup>961</sup>*Ibid.*

<sup>962</sup>*Idem* paras 717, 735, 741 and 752.

<sup>963</sup>*Idem* para 717.

#### 4.4.1.5 The Sentencing of Bemba.

In handing down its judgment, the Trial Chamber III considered cumulative convictions once again, relying on the rulings in the *Katanga case* and the *ad hoc* tribunals.<sup>964</sup> In the *Katanga case*, The Trial Chamber stated that cumulative convictions were allowed where:

The conduct in question clearly violates two distinct provisions of the Statute, each demanding proof of a “materially distinct” element not required by the other. An element will be considered distinct if it requires proof of a fact not required by the other.<sup>965</sup>

In agreeing with the decisions in *Katanga* and the *ad hoc* tribunals, the Trial Chamber III held that crimes against humanity and war crimes had ‘materially distinct elements, each requiring proof of a fact not required by the other’ and ‘not the acts or omissions of the accused’.<sup>966</sup> The Trial Chamber therefore found that it could convict Bemba for rape as a war crime and crime against humanity, and murder in the like manner.<sup>967</sup>

The Trial Chamber III sentenced Bemba on 21 June 2016. For each crime committed the Trial Chamber considered the gravity of the crime and aggravating circumstances. It stated that the gravity of the crime was

a principal consideration in imposing a sentence. In cases of command responsibility, the Chamber must assess the gravity of (i) the crimes committed by the convicted person’s subordinate, and (ii) the convicted person’s own conduct in failing to prevent or repress the crimes, or submit the matter to the competent authorities.<sup>968</sup>

In assessing the gravity of rape, the Trial Chamber heard evidence from two experts in ‘post-traumatic stress disorder and sexual violence in armed conflict’ who testified as to the medical, psychological, psychiatric and social consequences that rape victims suffer.<sup>969</sup> The Trial Chamber also heard the evidence from another expert who testified on the ‘longitudinal and intergenerational impact of mass sexual violence’, who noted that:

The more severe the crime is – for instance someone who “was gang raped multiple times”, particularly intimate and humiliating traumatic experiences like rape ... witnessed by family

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<sup>964</sup> For example, see *Prosecutor v Germain Katanga* ‘Judgment pursuant to article 74 of the Statute (7 March 2014) ICC-01/04-01/07, paras 1692 – 1696.

<sup>965</sup> *Idem* paras 1695.

<sup>966</sup> *Prosecutor v Jean-Pierre Bemba Gambo* ‘Judgment pursuant to article 74 of the Statute’ para 750-751.

<sup>967</sup> *Idem* para 751.

<sup>968</sup> *Prosecutor v Jean-Pierre Bemba Gambo* ‘Decision on sentence pursuant to article 76 of the Statute’ (21 June 2016) ICC-01/05-01/08, para 15.

<sup>969</sup> *Idem* para 36.

members, and the rape of children – the more likely it will increase the magnitude of negative and permanent psychological issues.<sup>970</sup>

With regard to the crime of rape and pillaging, the Trial Chamber III took into account the following aggravating circumstances, which included:

Whether the victims were armed, the location of a crime, for example, whether it was committed in places of civilian sanctuary, such as churches and hospitals or the victims' homes, the victims' ages, particularly in cases of sexual violence, the duration and repeated nature of the acts, the perpetrators' motives, and the violent and humiliating nature of the acts, including their public nature, and any verbal, physical, or other abuse or threats accompanying the crime.<sup>971</sup>

The Trial Chamber found that the crime of rape along with the crime of murder and pillaging were of serious gravity.<sup>972</sup> In the case of the aggravating circumstance regarding rape, the Trial Chamber found that this crime was 'committed against particularly defenceless victims and with particular cruelty.'<sup>973</sup> The Chamber found no mitigating circumstance<sup>974</sup> on the cumulative convictions when giving its judgment in Bemba's case.<sup>975</sup> It therefore imposed the same sentence for rape as a crime against humanity and war crime, as they had 'distinct contextual elements.'<sup>976</sup> Consequently, the Chamber sentenced Bemba to 18 years imprisonment for rape as a crime against humanity and 18 years for rape as a war crime – the highest sentence, which it could impose.<sup>977</sup> The sentences were to run concurrently with those for murder and pillaging.<sup>978</sup>

Although the prosecutor was successful in convicting Bemba for SGBCs committed in armed conflict, the full extent of the suffering experienced by the victims, and the gravity of the accused's criminal conduct was diminished when the Pre-Trial Chamber dismissed the cumulative charges of torture and outrages upon personal dignity.<sup>979</sup> The full extent of Bemba's

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<sup>970</sup> *Idem* para 37.

<sup>971</sup> *Idem* para 25.

<sup>972</sup> *Idem* para 93.

<sup>973</sup> *Ibid.*

<sup>974</sup> *Ibid.*

<sup>975</sup> *Idem* para 95.

<sup>976</sup> *Idem* para 94.

<sup>977</sup> *Ibid.*

<sup>978</sup> *Idem* para 95.

<sup>979</sup> *The Prosecutor v Jean-Pierre Bemba Gambo* 'Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to rule 103 of the Rules of Procedure and Evidence' at paras 39 and 40. Laurie Green 'First-class crimes, second-class justice: Cumulative charges for gender-based crimes at the International Criminal Court' (2011) 11 *International Criminal Law Review* 529 at 541 (stating that 'the opportunities for gender justice were lost when the Pre-Trial Chamber denied cumulative charges for sexual and gender-based crimes in Bemba.') Green also argues that the culture surrounding SGBCs can only be broken by recognising the full spectrum of harm caused by these crimes, and by charging SGBCs accordingly.) Kai Ambos 'Critical issues in the Bemba confirmation decision'

culpability and ‘complete picture of his criminal conduct’ was not portrayed on account of the charges of torture and outrages upon personal dignity relating to these SGCCs not being charged cumulatively.<sup>980</sup> In finding that it was not feasible to cumulatively charge the crime of torture and outrages upon personal dignity with rape, the Pre-Trial Chamber considered the same evidence in satisfying the elements of each crime.<sup>981</sup> The Pre-Trial Chamber did not ‘consider the legal elements of each offence’ but ‘the acts or omissions giving rise to the offence’.<sup>982</sup> As pointed out by scholars, a review of the history of how the Rome Statute and of the Elements of Crimes were negotiated points to the intention that some crimes be charged cumulatively.<sup>983</sup> Multiple charges based on the same conduct assist Trial Chambers ‘to enter multiple convictions based on that conduct, at least with respect to charges that contain materially distinct elements’.<sup>984</sup> If the Pre-Trial Chamber had not dismissed the cumulative charges for torture and outrages upon personal dignity, the Trial Chamber might have felt empowered to hand down a sentence of 25 years as recommended by the prosecution.<sup>985</sup>

The first sentence imposed by the ICC for SGBCs for a crime as serious as rape which causes lifelong harm to victims, should serve to deter perpetrators. The 18-year sentence handed down does not reflect the gravity of the crime, especially as the time already spent in custody is taken into account,<sup>986</sup> and the sentence can be reviewed after two thirds of it has been served<sup>987</sup>

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(2009) 22 *Leiden Journal of International Law* 715 at 724 (argues against cumulative charging. She states that the practice of cumulative charging is unnecessary and creates ‘a difficult situation for the defence.’ She also considers it as an overcharging of charges.)

<sup>980</sup> The War Crimes Research Office at the American University Washington College of Law *amicus curiae* brief ‘The Practice of Cumulative Charging before International Criminal Bodies’ February 2011, para 8 (Appeals Chamber) available at [www.legal-tools.org/doc/ad00a6/pdf/](http://www.legal-tools.org/doc/ad00a6/pdf/) (accessed on 2 June 2017).

<sup>981</sup> *Idem* at para 19.

<sup>982</sup> *Idem* at para 21. Green ‘First-class crimes, second-class justice’ at 534. Both referring to the ICTY Appeals Chambers Judgment in the case of *Prosecutor v Kordic & Cerkez* where the Tribunal stated that ‘what must be considered are the legal elements of each offences, not the acts or omissions giving rise to the offence.’

<sup>983</sup> *Prosecutor v Jean-Pierre Bemba Gambo* ‘Amicus Curiae Observations of the Women’s Initiatives for Gender Justice pursuant to rule 103 of the Rules of Procedure and Evidence.’ Green ‘First-class crimes, second-class justice’ at 536.

<sup>984</sup> *Idem* at paras 2 and 8.

<sup>985</sup> Erdei is of a different opinion that cumulative convictions will necessarily ensure that the convict receives the appropriate sentence. Ildiko Erdei ‘Cumulative convictions in international criminal law: Reconsideration of a seemingly settled issue’ (2011) 34 *Suffolk Transnational Law Review* 317 at 328.

<sup>986</sup> *Prosecutor v Jean-Pierre Bemba Gambo* ‘Decision on sentence pursuant to article 76 of the Statute’ at para 96. Article 78(2) of the Rome Statute, allows for the deduction in detention of an accused. Article 78(2) provides that: In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

<sup>987</sup> Rome Statute, art 110(3) provides that:

possibly entitling the convict may get an early release. Although the *ad hoc* tribunals such as the ICTR have handed down lower sentences for rape, as in the *Akayesu* case where the accused received 15 years imprisonment for rape, the Rome Statute allows judges to impose higher sentences, up to a maximum term of 30 years imprisonment or ‘a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person’.<sup>988</sup> Scholars such as Whiting have drawn attention to the fact that sentences for direct participation in the crimes attract a higher sentence than those for command responsibility.<sup>989</sup> Although the prosecution sought on appeal to have Bemba’s sentence increased to 25 years,<sup>990</sup> the outcome of that endeavour will never be known as Bemba was acquitted of all charges brought against him when he appealed against his conviction and sentence.

#### 4.4.1.6 Short lived victory, the reversal of Bemba’s conviction

Bemba’s conviction and sentence was short-lived as a majority of the Appeals Chamber on 8 June 2018 reversed his conviction, and acquitted him of all the charges.<sup>991</sup> The successful prosecution of Bemba by the Trial Chamber would have been the ICC’s first conviction for crimes of SGBV and also for rapes committed against men. It was hailed as a landmark conviction by many rights groups and feminists who fought to have these crimes recognised in their own right.<sup>992</sup> Bemba’s conviction was also a first of an accused convicted by the ICC under

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When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

<sup>988</sup> Rome Statute, art 77(1) which provides that:

Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

- (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person

<sup>989</sup> Alex Whiting ‘The Bemba conviction at the ICC: Lessons for the future’ (30 March 2016) available at <https://www.justsecurity.org/30325/bemba-conviction-icc-lessons-future/> (accessed 29 August 2018). See also Stephanos Bibas and William W Burke-White ‘International idealism meets domestic-criminal-procedure realism’ (2010) *Penn Law: Legal Scholarship Repository* 637 at 693 (suggesting that ‘the ICC could consider domestic practice in the territorial state as an explicit element at sentencing’ as ‘the result would likely be longer sentences for most convicts but greater harmonization with domestic practice’).

<sup>990</sup> ICC Bemba Appeal – Open Society Foundations available at <https://www.opensocietyfoundations.org/factsheets/icc-bemba-appeal> (accessed 29 August 2018).

<sup>991</sup> *Prosecutor v Jean-Pierre Bemba Gombo* ‘Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”’ (8 June 2018) ICC-01/05-01/08 A.

<sup>992</sup> Amnesty International, for example, stated that the judgment sent ‘a clear message that impunity for sexual violence as a tool will not be tolerated. ACADHOSHA, a Congolese human rights and justice group averred that the ‘judgment strengthen the ICC’s credibility in Africa.’ Whilst the Prosecutor of the ICC, Fatou Bensouda, contended that Bemba’s conviction ‘marks a crucial moment in the long search for justice for the victims of the 2002-2003

article 28(a) of the Rome Statute for sexual offences. As stated by the Pre-Trial Chamber II during the confirmation of charges hearing, under this article:

A superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfil his duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities. This sort of responsibility can be better understood “when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act”.<sup>993</sup>

The ICC prosecutor, in referring to the legal obligations of commanders, declared that commanders had ‘a legal obligation to exercise responsible command and control over their troops to provide sufficient training to ensure that their troops do not commit atrocities’.<sup>994</sup> She added that the case was ‘noteworthy in that it has highlighted the critical need to eradicate sexual and gender-based crimes as weapons of war in conflict by holding accountable those who fail to exercise their duties and responsibilities that their status as commanders and leaders entail’.<sup>995</sup> The rest of this section considers the Appeals Chamber’s reversal of Bemba’s conviction.

#### **4.4.1.6 (i) The Appeals Chamber reversal of Bemba’s conviction**

The Appeals Chamber’s decision to acquit Bemba of all charges is viewed by critics as a ‘controversial reversal’ and reinterpretation of ‘key elements of the Rome Statute’.<sup>996</sup> The Appeals Chamber held that the Trial Chamber could not convict Bemba of the crimes brought against him as the crimes ‘were not within the facts and circumstances described in the charges’ and the prosecution had not established Bemba’s link to the crimes under article 28(a) of the Rome Statute.<sup>997</sup> Judge Eboe-Osuji, who was one of the majority judges, initially favoured a retrial, but later decided concur with the majority judges, Judges van den Wyngaert and Morrison

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events in Central African Republic. International Justice Monitor ‘Reactions to Bemba’s conviction’ available at [www.ijmonitor.org/2016/03/reactions-to-bembas-conviction](http://www.ijmonitor.org/2016/03/reactions-to-bembas-conviction) (accessed 27 July 2016). International Criminal Court ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the conviction of Mr Jean-Pierre Bemba: ‘This case has highlighted the critical need to eradicate sexual and gender-based crimes as weapons in conflict’ available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-bemba-21-03-2016> (accessed 27 July 2016).

<sup>993</sup> *Prosecutor v Jean-Pierre Bemba Gombo* ‘Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo’ at para 405.

<sup>994</sup> International Criminal Court ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the conviction of Mr Jean-Pierre Bemba.’

<sup>995</sup> *Ibid.*

<sup>996</sup> Alex Whiting ‘Appeals judges turn the ICC on its head with Bemba decision’ (14 June 2018) available at <https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision> (accessed 29 August 2018). Leila N Sadat ‘Fiddling while Rome Burns? The Appeals Chamber’s curious decision in Prosecutor v Jean-Pierre Bemba Gombo’ (12 June 2018) available at <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-deci...> (accessed 29 August 2018).

<sup>997</sup> *Prosecutor v Jean-Pierre Bemba Gombo* ‘Judgment on the appeal of Mr Jean-Pierre Bemba Gombo’ para 2.

that an acquittal was appropriate.<sup>998</sup> Judge Eboe-Osuji gave a separate opinion from the other two majority judges. The two dissenting judges, Judges Manageng and Hofmański, upheld the Trial Chamber's decision.<sup>999</sup> Bemba's appeal was based on six grounds:

1. The trial was unfair.
2. The conviction exceeded the charges.
3. He was not liable as a superior.
4. The contextual elements were not established.
5. The Trial Chamber erred in its approach to identification evidence.
6. Other procedural errors invalidated the conviction.<sup>1000</sup>

The majority appeal judges considered grounds two and three whilst the dissenting judges considered all six grounds of appeal. Article 83(2) of the Rome Statute provides that an Appeals Chamber may intervene where it 'finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error. The Appeals Chamber, however, deviated from its conventional standard of appellate review for factual errors, and that applied by ICTY and ICTR *ad hoc* tribunals and many domestic courts.<sup>1001</sup> Under the conventional standard, the Appeals Chamber determines 'whether a reasonable trial chamber could have been satisfied beyond reasonable doubt as to the finding in question, thereby applying a margin of deference to the factual findings of the trial chamber'.<sup>1002</sup> In considering the margin of deference, the Appeals Chamber has in the past held that:

It will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts.

As to the 'misappreciation of facts', the Appeals Chamber has also stated that:

It will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it

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<sup>998</sup> *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' Concurring separate opinion of Judge Ebo-Osuji, para 1.

<sup>999</sup> *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' Dissenting opinion of Judge Manageng and Judge Hofmański, para 1.

<sup>1000</sup> *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' para 29.

<sup>1001</sup> The judges in the dissenting opinion referred to this standard of appellate review as the 'conventional standard'. *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' Dissenting opinion, para 6.

<sup>1002</sup> *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' para 38.

cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.<sup>1003</sup>

The Appeals Chamber, however, in Bemba's case stated that the margin of deference 'must be approached with extreme caution'.<sup>1004</sup> Judge Eboe-Osuji's view on the margin of deference, in his separate opinion, was 'that the notion of appellate deference for the factual findings of the Trial Chamber is arguably something of a blind-spot in the ICC appellate jurisprudence, resulting directly from the undiscerning reception of the notion from the jurisprudence of the *ad hoc* tribunals'.<sup>1005</sup> In explaining the role of appellate deference to lower court findings was one of judicial policy rather than a legal matter, he stated that:

It must be observed that the Rome Statute does not suggest—let alone require—appellate deference to the factual findings of the Trial Chamber. Indeed, there are specific provisions of the Rome Statute the terms of which obstruct, at least, a clear view of appellate deference as a standard norm in final, merits appeals in this Court. Article 83(1) is one of them. It provides as follows: 'For the purposes of proceedings under article 81 and this article, *the Appeals Chamber shall have all the powers of the Trial Chamber*' [emphasis added]. As there is no equivalent provision in their statutes, the case law of the ICTY and ICTR may have forged a mould of appellate deference that may not fit the specific circumstances of administration of justice at the ICC, as a direct product of construction of the Rome Statute, and especially in light of the further analysis made below.<sup>1006</sup>

The Appeals Chamber was 'of the opinion that it may interfere with the factual findings of the first-instance chamber whenever the failure to interfere may occasion a miscarriage of justice, and not "only in the case where [the Appeals Chamber] cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it"'.<sup>1007</sup> It further stated the importance of the Appeals Chamber not tying its 'hands against the interest of justice', especially as the Rome Statute did not provide for the notion of appellate deference or require the Appeals Chamber to apply that particular notion.<sup>1008</sup> It also stated that the Appeals Chamber 'will not assess the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the trial chamber'. Also 'that it will determine whether a reasonable trial chamber properly directing itself could have been satisfied beyond reasonable doubt as to

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<sup>1003</sup> *Idem* para 39, referring to the *Lubanga* Appeal judgment.

<sup>1004</sup> *Idem* para 38.

<sup>1005</sup> *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' Concurring separate opinion of Judge Ebo-Osuji, para 44.

<sup>1006</sup> *Idem* para 45.

<sup>1007</sup> *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' para 40.

<sup>1008</sup> *Ibid.*



the finding in question, based on the evidence that was before it'.<sup>1009</sup> In justifying its decision to deviate from its normal practice of appellate review, the Appeals Chamber stated:

The Appeals Chamber must be satisfied that factual findings that are made beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale. Mere preferences or personal impressions of the appellate judges are insufficient to upset the findings of a trial chamber. However, when a reasonable and objective person can articulate serious doubts about the accuracy of a given finding, and is able to support this view with specific arguments, this is a strong indication that the trial chamber may not have respected the standard of proof and, accordingly, that an error of fact may have been made.

When the Appeals Chamber is able to identify findings that can reasonably be called into doubt, it must overturn them. This is not a matter of the Appeals Chamber substituting its own factual findings for those of the trial chamber. It is merely an application of the standard of proof.<sup>1010</sup>

With regard to the second ground of appeal, Bemba argued that he should not have been convicted of criminal acts which exceeded the 'facts and circumstances described in the charges' that had not been confirmed by the Pre-Trial Chamber.<sup>1011</sup> The provision which the Appeals Chamber took into consideration to base its findings, was article 74(2) of the Rome Statute, which provides:

The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

The Appeals Chamber held that the charges, confirmed against Bemba, were broadly formulated, as they were 'confirmed in relation to categories of crimes, without any further qualification'. As a result, such charges were insufficient to bring Bemba to trial, as they did not come within the description of article 74(2)'s 'facts and circumstances'.<sup>1012</sup> The Appeals Chamber applied the same reasoning relating to crimes contained in the Amended Document Containing the Charges that were confirmed by the Pre-Trial Chamber.<sup>1013</sup> Apart from considering article 74(2) of the Rome Statute, it also took cognisance of regulation 52(b) of the Regulations of the Court, which states that documents containing the charges must set out a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring

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<sup>1009</sup> *Idem* para 42.

<sup>1010</sup> *Idem* paras 45 and 46.

<sup>1011</sup> *Idem* para 99.

<sup>1012</sup> *Idem* para 107.

<sup>1013</sup> *Ibid.*

the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court'. In applying this regulation, the Appeals Chamber stated that:

Simply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52 (b) of the Regulations of the Court and does not allow for a meaningful application of article 74 (2) of the Statute

The Appeals Chamber also held that Bemba could not be convicted of criminal acts which had been added after the issuance of the Confirmation Decision, as they were not, 'facts and circumstances described in the charges'.<sup>1014</sup> It stated that from the way the prosecutor had pleaded the charges she should have added the additional criminal acts by amending the document containing the charges.<sup>1015</sup> As a result, the Appeals Chamber identified two murders, various pillagings and rapes of a man, women and unidentified girls as falling outside the 'facts and circumstances described in the charges', brought against Bemba.<sup>1016</sup> Thus, although Bemba could not be convicted of these crimes, they were relevant to establish 'the contextual element of crimes against humanity, which operates at a higher level of abstraction'.<sup>1017</sup> In relation to these crimes, the Appeals Chamber reversed Bemba's conviction and discontinued the proceedings relating to them.<sup>1018</sup> The Appeals Chamber found that the Trial Chamber could only have convicted Bemba of one murder, the rape of 20 persons and five acts of pillaging, as they came within the scope of the charges.<sup>1019</sup>

The Appeals Chamber considered the third ground of appeal, which related to Bemba's liability as a superior under article 28(a) of the Rome Statute. In doing so, the Appeals Chamber limited its assessment of Bemba's liability to whether he failed to take 'all necessary and reasonable measures within his power to prevent or repress the commission of crimes by his subordinates during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities'.<sup>1020</sup> The Appeals Chamber stated that assessing all the necessary and reasonable measures taken by a commander requires 'consideration of what measures were at his or her disposal in the circumstances at the time' and that this, 'must be based on considerations of what

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<sup>1014</sup> *Idem* para 115,

<sup>1015</sup> *Ibid.*

<sup>1016</sup> *Idem* para 116.

<sup>1017</sup> *Idem* para 117.

<sup>1018</sup> *Idem* para 197.

<sup>1019</sup> *Idem* paras 118-119.

<sup>1020</sup> *Idem* para 120.

crimes the commander knew or should have known about and at what point in time’.<sup>1021</sup> It also stated that a commander need not ‘take each and every possible measure at his or her disposal’ as ‘article 28 only requires commanders to do what is necessary and *reasonable* under the circumstances’ [Court’s emphasis].<sup>1022</sup> Consequently, the Appeals Chamber found that the Trial Chamber had made seven errors which ‘resulted in an unreasonable assessment of whether Mr Bemba failed to take all necessary and reasonable measures in the circumstances existing at the time’.<sup>1023</sup> It therefore found that the Trial Chamber erred in respect of the following issues:

- (i) failing to properly appreciate the limitations that Mr Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country;
- (ii) failing to address Mr Bemba’s argument that he sent a letter to the CAR authorities before concluding that Mr Bemba had not referred allegations of crimes to the CAR authorities for investigation;
- (iii) in considering that the motivations that it attributed to Mr Bemba were indicative of a lack of genuineness in adopting measures to prevent and repress the commission of crimes;
- (iv) in attributing to Mr Bemba any limitations it found in the mandate, execution and/or results of the measures taken;
- (v) in finding that Mr Bemba failed to empower other MLC officials to fully and adequately investigate and prosecute crimes;
- (vi) in failing to give any indication of the approximate number of the crimes committed and to assess the impact of this on the determination of whether Mr Bemba took all necessary and reasonable measures; and
- (vii) by taking into account the redeployment of MLC troops, for example to avoid contact with the civilian population as a measure available to Mr Bemba

On account of these errors, the Appeals Chamber reversed Bemba conviction, and acquitted him of the charges of one murder, the rape of 20 persons and five acts of pillaging.<sup>1024</sup>

#### **4.4.1.6 (2) How the Appeals Chamber’s decision will affect the prosecution of sexual and gender-based crimes.**

##### ***(i) The standard of review***

The dissenting judges and critics have discussed the effect which the reversal of the conventional application of appellate review for factual errors would have on future cases, particularly as the Appeals Chamber stated it ‘will not access the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the trial chamber’.<sup>1025</sup> The

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<sup>1021</sup> *Idem* para 168.

<sup>1022</sup> *Idem* para 169.

<sup>1023</sup> *Idem* paras 166 and 193.

<sup>1024</sup> *Idem* para 198.

<sup>1025</sup> *Idem* para 42.

dissenting judges viewed the majority's decision to modify the standard of review as 'unwarranted and contrary to the corrective model of appellate review and, in some aspects, potentially inconsistent with the Statute'.<sup>1026</sup> They also held that such modifications would 'lead to inconsistencies, which will make it difficult for anyone to understand'.<sup>1027</sup> Though they recognised that the Appeals Chamber was not obligated to follow its previous decisions, they recalled previous Chamber's decisions, which held that they would not depart from previous decisions unless there were, convincing reasons to do so.<sup>1028</sup> They warned that departing from previous jurisprudence could cause in lack of predictability of court decisions and consequent lack of public reliance on decisions in which there was no apparent fairness.<sup>1029</sup> The Trial Chamber was in a better position 'than the Appeals Chamber to assess the reliability and credibility of evidence' because the Trial Chamber observes witnesses when testifying, hears the parties' and participants' submissions and is familiar with the case, having seen it unfold right from the start of the trial.<sup>1030</sup> Although Appeal Chambers have 'access to the trial record and can therefore consult the transcripts of the witnesses' testimony and documentary evidence and study the parties' and participants' submissions before a trial chamber',<sup>1031</sup> its assessment of evidence from the record was not equivalent to that of the Trial Chamber, possibly resulting in the very miscarriage of justice which it purported to avoid. With regard to SGBCs it is essential that all the evidence is scrutinised, which includes observing the victims and other participants right from the commencement of the case. As stated by Sacouto, '[w]ithout a thorough review of all the evidence – including a contextual analysis of whether and how sexual violence that may at first appear unintended might actually be connected to the commission of other crimes and thus attributable to the individual(s) responsible for those crimes – sexual violence crimes may well go unpunished'.<sup>1032</sup>

Although the Appeals Chamber declined to access all the evidence in the Bemba case *de novo*, it has left open the possibility of another Appeals Chamber doing so. The dissenting judges

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<sup>1026</sup> *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' Dissenting opinion, para 4.

<sup>1027</sup> *Ibid.*

<sup>1028</sup> *Idem* para 5.

<sup>1029</sup> *Ibid.*

<sup>1030</sup> *Idem* para 6.

<sup>1031</sup> *Idem* para 7.

<sup>1032</sup> Susana Sacouto 'The impact of the Appeals Chamber decision in Bemba: Impunity for sexual and gender based crimes?' available at <https://www.ijmonitor.org/.../the-impact-of-the-appeals-chamber-decision-in-bemba-i...> (accessed 29 August 2018).

warned that an Appeals Chamber accessing all the evidence *de novo* could turn into another trial, leading into inordinate delays in the case heard and the risk of inaccuracy in the evidence. In addition, it is not for the Appeals Chamber to apply a beyond reasonable doubt evidentiary standard directly, as its review is a corrective one, assessing the reasonableness of the impugned finding.<sup>1033</sup> Hearing the evidence *de novo* for SGBCs years after the incident occurring might be hamstrung by the death or relocation of victims and witnesses, or inaccuracy of evidence on account of the passage of time, weakening the possibility of a conviction.<sup>1034</sup> In addition, living witnesses might be disinclined to give evidence once again because they might lose their compensation in the event of a conviction being overturned.

***(ii) Restricting the Pre-Trial Chamber's role to confirming charges that are not broadly formulated***

The Appeals Chamber ruling that it is not sufficient for the Prosecutor to list ‘the categories of crimes with which a person is to be charged, or state in broad general terms the temporal and geographical parameters of the charge’, was because this did not ‘comply with the requirements of regulation 52(b) of the Regulations of the Court, did not allow for a meaningful application of article 74(2) of the Statute’<sup>1035</sup> and was inconsistent with the Pre-Trial Chamber’s role in confirming charges. The purpose of the confirmation of charges hearing was to filter those charges and cases which should go to trial from those which should not.<sup>1036</sup> In the *Bemba* case, for example, one of the reasons why the Pre-Trial Chamber declined to confirm the charges of torture and outrages upon personal dignity was because the prosecutor had ‘failed to properly notify the defence of the material facts underlying these charges in the amended DCC’.<sup>1037</sup> The Pre-Trial Chamber declined the prosecution’s application for leave to appeal its decision, holding that the Pre-Trial Chamber had a duty to filter those cases which would go to trial and detect deficiencies which would affect the case.<sup>1038</sup> Thus, the Pre-Trial Chamber cannot just accept whatever charges are presented before it. A literal reading of article 61(7) of the Rome Statute on

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<sup>1033</sup> *Prosecutor v Jean-Pierre Bemba Gombo* ‘Judgment on the appeal of Mr Jean-Pierre Bemba Gombo’ Dissenting opinion para 14.

<sup>1034</sup> *Idem* para 7.

<sup>1035</sup> *Prosecutor v Jean-Pierre Bemba Gombo* ‘Judgment on the appeal of Mr Jean-Pierre Bemba Gombo’ para 110.

<sup>1036</sup> *Prosecutor v Callixte Mbarushimana* ‘Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011’ at para 39.

<sup>1037</sup> *Idem* at paras 4, 5 and 63.

<sup>1038</sup> *Idem* at paras 52 and 79.

confirming or declining charges presented before the Pre-Trial Chambers would hinder its task of conducting fair and expeditious proceedings and protecting the rights of the defence.<sup>1039</sup> It was the prosecutor's duty to ensure the provision of all facts relevant to the charges, as the Chamber would not address any factual deficiencies.<sup>1040</sup>

The evidentiary threshold which Pre-Trial Chambers have applied to confirm charges for trial is lower than that required by the Trial Chamber for a conviction. The threshold is that of 'substantial grounds to believe', whilst that before the Trial Chamber is 'beyond reasonable doubt'.<sup>1041</sup> The 'substantial grounds to believe' threshold accords with the gatekeeper function at the Pre-Trial stage as:

- (i) only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion;
- (ii) the suspect is protected against wrongful prosecution; and
- (iii) judicial economy is ensured by distinguishing between cases that should go to trial and those that should not.<sup>1042</sup>

The minority judges succinctly stated the normal practice of pre-trial judges in confirming charges, when they stated that:

Where specific criminal acts are alleged to support a more broadly described charge, the pre-trial chamber must consider these acts in so far as it may serve its enquiry into whether there is sufficient evidence to establish substantial grounds to believe that the person committed the *crimes charged* [Court's emphasis]. In such a case, allegations of such criminal acts are primarily vehicles to prove a broader allegation and it may therefore not be necessary for the pre-trial chamber to assess all criminal acts put forward by the Prosecutor.<sup>1043</sup>

Thus, the majority decision in the Bemba's case, which required the Pre-Trial Chamber to confirm all individual criminal acts at the confirmation of charges hearing, creates a higher evidentiary threshold than the 'substantial grounds to believe' one as provided in article 61(7) of the Rome Statute.<sup>1044</sup> The advantage of having charges which are broadly formulated and confirmed by the Pre-Trial Chamber is that the prosecutor can rely on those individual criminal

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<sup>1039</sup> *Ibid.*

<sup>1040</sup> *Idem* at paras 65 and 80.

<sup>1041</sup> Rome Statute, art 61(7). See section 4.2.1 above which sets out the text of article 61(7). *Ibid.*

<sup>1042</sup> *Prosecutor v Laurent Gbagbo* 'Decision adjoining the hearing on the confirmation of charges pursuant to article 61(7)(c)(ii) of the Rome Statute, ICC-02/11-01/11 (3 June 2013) para 18. *Prosecutor v Callixte Mbarushimana* 'Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I' para 39.

<sup>1043</sup> *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' Dissenting opinion para 34.

<sup>1044</sup> Alex Whiting 'Appeals judges turn the ICC on its head with Bemba decision. Susan Sacouto 'The impact of the Appeals Chamber decision in Bemba:

acts before the Trial Chamber which were not confirmed before the Pre-Trial Chamber, as long as they are within the scope of those charges which were confirmed.<sup>1045</sup>

Those who favour the majority decision argue that this would make the prosecution properly prepare the case when charging those suspected of a crime. Karnavas for example, is of the opinion that when the prosecution adds criminal charges during the trial or when the evidence is being summed up, it is because the prosecution has failed to formulate the charges properly, is not prepared for trial or has not got the required evidence to establish the necessary burden of proof.<sup>1046</sup> Such instances, Karnavas claims, throw the defence off guard and do not safeguard the rights of the defence.<sup>1047</sup> Although Bemba did not argue on appeal that he had not received sufficient notice of the charges against him,<sup>1048</sup> it is not surprising that the majority appeal judges felt they had to set the record straight concerning the prosecution's presentation of evidence at the pre-trial stage. ICC judges have criticised prosecutions for, *inter alia*, the 'timing and length of investigations', and 'the quality of the evidence collected during the investigation' and presentation in court.<sup>1049</sup> Judge Hans-Peter Kaul and the Appeals Chamber in the *Mbarushimana* case have advised the prosecution to complete its investigation by the time of the confirmation hearing,<sup>1050</sup> as this allows for 'continuity in the presentation of the case and safeguards the rights of the Defence'.<sup>1051</sup> It also 'ensures that the commencement of the trial is not unduly delayed and upholds the right of the Defence to be tried without undue delay'.<sup>1052</sup>

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<sup>1045</sup> Michael Karnavas 'The reversal of Bemba's conviction: what went wrong or right?' available at [michaelgkarnavas.net/blog/2018/06/19/bemba-reversal](http://michaelgkarnavas.net/blog/2018/06/19/bemba-reversal) (accessed 28 August 2018).

<sup>1046</sup> *Ibid.* Dermot Groome 'No witness, no case: An assessment of the conduct and quality of the International Criminal Court investigations' (2014) 3 *Penn State Journal of Law and International Affairs* 1 at 6 (stating that '[s]ome defense teams have accused the Prosecution of changing their case theory in response to newly acquired witnesses and evidence late into the case').

<sup>1047</sup> *Ibid.*

<sup>1048</sup> *Prosecutor v Jean-Pierre Bemba Gombo* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo' para 98.

<sup>1049</sup> Dermot Groome 'No witness, no case' at 4.

<sup>1050</sup> Dissenting Opinion of Judge Hans-Peter Kaul, *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' (23 January 2012) ICC-01/09-02/11 para 57. *Prosecutor v Callixte Mbarushimana*, 'Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled Decision on the confirmation of charges, Appeals Chamber' ICC-01/04-01/10-514 (30 May 2012) para 44 (stating that 'the investigation should be largely completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber').

<sup>1051</sup> *Prosecutor v Laurent Gbagbo* 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute' para 25.

<sup>1052</sup> *Ibid.*

The Appeals Chamber decision means that it would be difficult for the prosecution to add charges not confirmed by the Pre-Trial Chamber at the trial stage, or obtain a modification of charges as sought by the lawyers in the *Lubanga* case, when they applied to have crimes of sexual slavery and inhuman or cruel treatment added to the charges against the accused. The prosecutor's appeal against the majority Trial Chamber's decision to modify the legal characterisation of the facts<sup>1053</sup> was met with the ruling that 'the Decision would have required the parties to investigate, prepare and address incidents and events that were not pleaded'.<sup>1054</sup> This would have resulted in a delay in the conclusion of proceedings.<sup>1055</sup>

The *Laurent Gbagbo* case is illustrative of the Pre-Trial Chamber falling in line with the Appeals Chamber decision against broadly pleaded charges, when it adjourned the confirmation of charges hearing to allow the prosecution to conduct further investigations. Obtaining reliable evidence at this stage of proceedings is crucial, as it lays the foundation of the prosecution's case. The next part of this section discusses the *Gbagbo* case.

### ***(iii) Adjourning the confirmation hearing for in-depth investigations***

Laurent Gbagbo was the former president of Côte d'Ivoire. He was charged with four counts of crimes against humanity for murder, rape and other forms of sexual violence, other inhumane acts and persecution committed during the 2010-2011 post-election violence in Côte d'Ivoire. He was also charged with attempted murder. These charges were brought under articles 25(3)(a) (indirect co-perpetrator), 25(3)(b) (orders, solicits or induces the commission of such a crime), 25(3)(d) (contributes to the commission or attempted commission of such a crime) and 28(a) and (b) (command responsibility).<sup>1056</sup> At the confirmation of charges hearing, the Pre-Trial Chamber deviated from its normal practice of either confirming the charges before it or declining to confirm them by applying article 61(7)(c)(i) of the Rome Statute which provides that it may

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<sup>1053</sup> Lubanga appealed on the 11 August 2009 whilst the Prosecutor appealed on 12 August 2009. *Prosecutor v Thomas Lubanga Dyilo* 'Judgment on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the decision of Trial Chamber I of 14 July 2009' at para 6.

<sup>1054</sup> *Prosecutor v Thomas Lubanga Dyilo* 'Prosecutor's application for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court"' (12 August 2009) ICC-01/04-01/06, para 25. Also, [P-0582, who was the leader of the prosecution's investigation team, when giving evidence said that it was decided at a meeting with the prosecution, that the accused would only be prosecuted 'for child-soldier-related offences.'](#) See *Prosecutor v Thomas Lubanga Dyilo* 'Judgment pursuant to article 74 of the Statute' at paras 126 and 146.

<sup>1055</sup> *Idem* at para 25.

<sup>1056</sup> *Prosecutor v Laurent Gbagbo* 'Decision on the confirmation of charges against Laurent Gbagbo' ICC-02/11-01/11 (12 June 2014).para 17.



‘adjourn the hearing and request the Prosecutor to consider [p]roviding further evidence or conducting further investigation with respect to a particular charge’.<sup>1057</sup> The majority Pre-Trial Chamber found that the prosecutor had relied heavily on anonymous hearsay evidence from non-governmental organisations (NGOs) together with press reports, regarding the ‘key elements of the case, including contextual elements of crimes against humanity’.<sup>1058</sup> It stated that reliance on such evidence placed the accused in a difficult position, as his rights were limited since he would not be able to ‘investigate and challenge the trustworthiness of the source of the information’. In addition, such evidence made it difficult to determine the probative value to attach to it.<sup>1059</sup> The Chamber also referred to the documentary or summary evidence relied on by the prosecution, rather than witness testimony, stating that this would limit it from evaluating the credibility of the witness’.<sup>1060</sup> It stated that although ‘NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges’.<sup>1061</sup> Though recognising that ‘article 61(5) of the Statute only requires the Prosecutor to support each charge with “sufficient” evidence at the confirmation hearing’, the majority of the Chamber assumed that the prosecutor had ‘presented her strongest possible case based on a largely completed investigation’.<sup>1062</sup> The Chamber pointed out the need for the prosecution to conduct further investigations, as it was unlikely its evidence would be useful at trial.<sup>1063</sup> The Chamber adjourned the hearing to give the prosecution the opportunity to obtain further evidence. It stated that that:

The Prosecutor’s evidence, viewed as a whole, although apparently insufficient, does not appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges under article 61(7)(b) of the Statute. Rather than making a final determination on the merits at this time, the Chamber considers it appropriate in this case to adjourn the Hearing pursuant to article 61(7)(c)(i) of the Statute.<sup>1064</sup>

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<sup>1057</sup> Judge Fernández dissented from the decision to adjourn the confirmation hearing.

<sup>1058</sup> *Prosecutor v Laurent Gbagbo* ‘Decision adjourning the hearing on the confirmation of charges’ para 29 and 35.

<sup>1059</sup> *Ibid.*

<sup>1060</sup> *Idem* para 33.

<sup>1061</sup> *Idem* para 35.

<sup>1062</sup> *Idem* para 25.

<sup>1063</sup> *Idem* para 32 (stating that ‘[u]nless the Prosecutor conducts further investigations, there is no prospect of more information becoming available about the source of the evidence’).

<sup>1064</sup> *Idem* para 15 and 44.

In allowing the prosecution to provide further evidence or conduct further investigations, the Chamber provided it with a list of issues to address.<sup>1065</sup>

The majority Appeals Chamber decision on the confirmation of all criminal acts raises both the positive and negative factors for the prosecution of SGBCs. Ngudjolo and Callixte (who were acquitted) might have been convicted of all the crimes charged if the prosecution had properly investigated their cases and produced the requisite evidence. The *Katanga* case illustrates the lack of preparation by the prosecution in proving SGBCs compared to the other crimes for which he was convicted. Proper preparation informs the prosecution of the strength of its case and assures victims and participants of the likelihood of a conviction once an action is commenced. A deficit of evidence at the pre-trial stage alerts the prosecution to the fact that there is no case to answer. Obtaining evidence and linking the accused to the crimes for SGBCs is more difficult than for other crimes, perhaps because the prosecution of these crimes is a relatively new legal institution. Time and money would therefore be wasted by conducting a trial that still needed extensive prosecutorial investigations.

On the negative side, after commencing a sexual and gender-based case, the prosecution may find that victims and witnesses, who initially were reluctant to come forward, may decide to do so as the case progresses. As Groome puts it '[c]hanges in security, disposition towards the court, and reaction to court proceedings can all prompt new witnesses to come forward. Over the course of a case, there may be better access to witnesses, crime scenes, and archives'.<sup>1066</sup> In addition, the majority Appeals Chamber decision could mean that confirmation hearings are now mini-trials, because the judges would pay more focused attention to the crimes presented at this stage of proceedings, and this could also have an adverse effect on the successful prosecution of SGBCs. Consequently, the confirmation hearing could take a longer time before charges are confirmed by the Pre-Trial Chamber. In the *Gbagbo* case for example, the confirmation of charges hearing was held from 19 to 28 February 2013, a decision adjourning the hearing was made on 3 June 2013, and more than a year elapsed before the charges were confirmed on 12 June 2014.

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<sup>1065</sup> *Idem* para 44.

<sup>1066</sup> Dermot Groome 'No witness, no case at 15. Susana Sacouto 'The impact of the Appeals Chamber decision in Bemba' (stating that 'investigators often do not prioritize investigation of sexual violence crimes from the outset'.

**(iv) Restrictive application to modes of liability relating to sexual and gender-based crimes.**

ICC prosecutions in ‘command and control’ type prosecutions for SGBCs have not been able to prove how the accused was linked to the crimes charged. In the *Bemba* case for example, just establishing there was a superior-subordinate relationship was insufficient. Proving effective command and control was necessary, as was ‘an awareness of crimes being committed (or sufficient information that would have put the superior on notice that crimes were being committed) and in all circumstances a failure to prevent and punish’.<sup>1067</sup> As put by the majority Appeals Chamber:

Simply juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time. The trial chamber must specifically identify what a commander should have done *in concreto*. Abstract findings about what a commander might theoretically have done are unhelpful and problematic, not least because they are very difficult to disprove. Indeed, it is for the trial chamber to demonstrate in its reasoning that the commander did not take specific and concrete measures that were available to him or her and which a reasonably diligent commander in comparable circumstances would have taken<sup>1068</sup>

Sacouto and other critics argue that the Appeals Chamber had applied an unduly restrictive interpretation to different modes of liability, such as in article 25(3)(a) of the Rome Statute. In doing so, she states that it sets ‘a particularly high bar for cases involving sexual violence charges’ thereby increasing the risk of impunity for these crimes.<sup>1069</sup> The *Bemba* case and others show how difficult it is to link the accused to the crimes charged, especially for SGBCs, and thus the necessity of obtaining evidence which cannot be disputed.

## **4.5 CONCLUSION.**

This chapter examined cases relating to SGBV committed in armed conflict situations, which came before the ICC. The analysis points to the fact that there are still teething problems the prosecution and judges of the ICC need to overcome to obtain successful convictions of SGBV crimes and restore its credibility. Although, the inclusion of SGBCs in the Rome Statute is one step closer to getting crimes of SGBV recognised in their own right, the law will not serve as a

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<sup>1067</sup> Michael Karnavas ‘The reversal of Bemba’s conviction: what went wrong or right?’

<sup>1068</sup> *Prosecutor v Laurent Gbagbo* ‘Decision adjourning the hearing on the confirmation of charges’ para 170.

<sup>1069</sup> Susana Sacouto ‘The impact of the Appeals Chamber decision in Bemba’

meaningful deterrent to those bent on committing such crimes until the ICC starts getting convictions for these crimes.

Apart from the *Lubanga* case where the prosecutor was reluctant to bring charges for an unfamiliar crime, other cases relating to SGBCs committed in armed conflict show that convicting an accused for these types of crimes is more challenging than for other crimes, in which international prosecutors have had the benefit of more years of experience. Prosecutors have been particularly unsuccessful in linking the accused to the mode of liability charged, especially when the accused is not a direct perpetrator of the crime. This buttresses Askin's point that judges would prefer to convict an accused for such crimes as killing, pillaging and torture, even when the accused was not near the scene of the crime.<sup>1070</sup> She criticises ICC judges for their reluctance 'to hold individuals accountable for sex crimes unless they are the physical perpetrators, they were present when crimes were committed, or they can be linked to evidence encouraging the crimes'.<sup>1071</sup>

The current prosecutor should ensure the execution of OTP Strategic Plan, 2016 to 2018 to deal with the issue of lack of evidence and improper charges. There is also need for higher jail sentences for SGBV convictions; in particular, ICC judges should consider revising upward the prison terms, especially given the likelihood of an accused's early release. Taking the gravity of SGBV into consideration and the lasting harm caused to victims both physically and psychologically, sentences should be for a longer term. Victims may feel that justice has not been done when the prison time spent by perpetrators of such crimes is minimal compared to the lasting harm caused to victims.

There is a necessity for fair representation of female and male judges at the ICC to ensure sensitivity to gender issues and the application of the law thereto. In the *Lubanga* case, for example, where Judge Benito dissented from the majority of the Chamber, which consisted of two male judges, she was of the opinion that the victims had been discriminated against when the court failed to include SGBV crimes within the legal concept of the term 'use to participate actively in the hostilities', thus making such crimes, invisible.

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<sup>1070</sup> Askin 'Katanga judgment underlines need for stronger ICC focus on sexual violence.'

<sup>1071</sup> *Ibid.*

This chapter also argues that there needs to be consistency from the ICC judges as to how they apply the law in handing down decisions. The recent Appeals Chamber decision in the Bemba case as to their interpretation of the Rome Statute has made it difficult for one to predict how other Chambers may lay down the law.

It has been suggested that a treaty which contains stronger language and guidelines and which prohibits, punishes and prevents gender-based violence crimes may help combat impunity for these crimes, similar to the 'current project on crimes against humanity treaty'.<sup>1072</sup> As pointed out by Margot Wallstrom, a former UN Special Representative on Sexual Violence in Conflict, it is not the inadequacy of the laws but inadequate enforcement that is the reason for failure to prosecute these crimes.<sup>1073</sup> Apart from the Rome Statute, there is abundant legislation in *ad hoc* tribunals, various human right instruments<sup>1074</sup> and United Nations resolutions<sup>1075</sup> relating to SGBV. The pertinent and necessary factor required is conviction for these crimes. It is a welcome development that the prosecutor now seems bolder in prosecuting SGBV crimes, with two such cases currently before the ICC.

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<sup>1072</sup> Mouthaan 'The prosecution of gender-based crimes at the ICC' at 795.

<sup>1073</sup> *UN News Centre* 'Tackling sexual violence must include prevention, ending impunity.'

<sup>1074</sup> Examples of these are the Vienna Declaration on Violence against Women 1993 and the Declaration on the Elimination of Violence against Women.

<sup>1075</sup> Examples of such resolutions are resolutions 1325, 1888 and 1820.

## CHAPTER 5

### THE AFRICAN UNION'S RESPONSE IN THE PROSECUTION OF SEXUAL AND GENDER-BASED VIOLENCE IN ARMED CONFLICT SITUATIONS AT THE REGIONAL LEVEL

#### 5.1 INTRODUCTION

The African continent has been no stranger to armed conflicts; in the 1970s alone the continent recorded more than 30 wars fought mainly intra-state.<sup>1076</sup> By 1996, 14 African states were engaged in armed conflicts.<sup>1077</sup> The 100-day genocide in Rwanda in 1994, and the armed conflicts which took place in Sierra Leone and Liberia all testified to the prevalence of armed conflicts in which sexual and gender-based violence (SGBV) was committed. Currently, the Democratic Republic of Congo (DRC) is experiencing armed conflict in which SGBV is prevalent.

This chapter assesses the response of the African Union (AU) in prosecuting SGBV at regional level. Burke-White argues for prosecuting international crimes at the regional level, in that such prosecution of international crimes could help balance the benefits and pitfalls of trials at international and domestic levels.<sup>1078</sup> Burke-White further argues that prosecution of international crimes at regional level may be a better means of taking legal action against perpetrators when considering issues such as costs, political independence, legitimacy and judicial reconstruction.<sup>1079</sup> The AU Assembly has attempted to meet most of the goals for prosecution of international crimes at the regional level by adopting the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, also referred to as the Malabo Protocol,<sup>1080</sup> at its 23rd ordinary session on June 27 2014.<sup>1081</sup> Although the adoption of the Malabo Protocol has received much criticism

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<sup>1076</sup> Report of the Secretary-General to the United Nations Security Council titled 'The causes of conflict and the promotion of durable peace and sustainable development in Africa' (A/52/871 – S/1998/318, 13 April 1998) at para 4. Joseph Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 39 at 43 (Quoting Kofi Annan in his report to the 52<sup>nd</sup> session of the General Assembly).

<sup>1077</sup> *Ibid. Ibid.*

<sup>1078</sup> William W Burke-White 'Regionalization of international criminal law enforcement: A preliminary exploration' (2003) 38 *Texas International Law Journal* 729 at 730.

<sup>1079</sup> *Ibid.*

<sup>1080</sup> The Malabo Protocol was adopted in Malabo, Equatorial Guinea.

<sup>1081</sup> Decision on the Draft Legal Instruments, Dec Assembly/AU/8(XXIII), Decision no Assembly/AU/Dec 529(XXIII), (26-27 June 2014) at para 2(e).

from scholars,<sup>1082</sup> the Protocol provides for the prosecution of SGBCs in armed conflict situations at the state level, through its General Affairs Section and at the individual level through its International Criminal Law Section.<sup>1083</sup>

The assessment of the AU's response to prosecuting SGBCs in armed conflict situations at the regional level is to determine whether the proposed African Court of Justice and Human and Peoples' Rights (ACJHPR) will be a useful means of bridging the impunity gap for SGBV committed on the continent in armed conflict situations. When inundated with cases, the International Criminal Court (ICC) will be forced by financial constraints to be selective as to cases chosen for trial. The yearly forecast of activities of the Office of the Prosecutor (OTP) of the ICC is proof that not every situation of SGBV would necessarily be selected for trial at the ICC.<sup>1084</sup> Thus, it would be necessary to fill the impunity gap at the regional level, where hearing cases of SGBV committed in armed conflict situations is difficult to prosecute at either the international or the domestic level. Moreover, if other AU states follow the lead of those states which have already expressed their intention to leave the ICC,<sup>1085</sup> and carry out their threat, an

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<sup>1082</sup> Abass for example, is of the opinion that the creation of the ACJHPR does not add any value to the international prosecution of crimes. Ademola Abass 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *The European Journal of International Law* 934 at 936. See also Coalition for an effective African Court on Human and Peoples' Rights et al 'Implications of the African Court of Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity and war crimes' at 14 available at

[http://www.africancourtcoalition.org/images/docs/submissions/opinion\\_african\\_court\\_extension\\_jurisdiction.pdf](http://www.africancourtcoalition.org/images/docs/submissions/opinion_african_court_extension_jurisdiction.pdf) (accessed on 16 February 2017) (stating that 'conferring criminal jurisdiction on the African court will require the re-design of the institutions and instruments of the African regional human rights system as well as the establishment and funding of a complementary regional regime of cooperation in criminal matters.').

<sup>1083</sup> See 5.3 below regarding these Sections.

<sup>1084</sup> Office of the Prosecutor (OTP) of the ICC strategic plan for 2016-2018, the OTP forecast nine preliminary examinations, one new situation under investigation, six active investigations, nine hibernated investigations, five pre-trial phase, five-trial phase and two final appeals. ICC-OTP, Strategic Plan| 2016-2018, 6 July 2015 at 24 available at [https://www.icc-cpi.int/.../070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/.../070715-OTP_Strategic_Plan_2016-2018.pdf) (accessed 11 November 2016).

<sup>1085</sup> In October 2016, Burundi's Parliament voted in favour of leaving the ICC. On 27 October 2016, Burundi officially informed the UN of its intention to withdraw from the ICC. Burundi stated that its reason for withdrawing from the ICC was that the preliminary investigations into Burundi's pre-election violence by the ICC in April 2016 violated the complementary principle in the Rome Statute. Burundi officially informs UN of intent to leave ICC available at <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims> (accessed 10 February 2017). United Nations Reference: 'C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification)' available at <https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf> (accessed 10 February 2017). South Africa and The Gambia had also announced their intention to withdraw from the ICC in October 2016. South Africa's instrument of withdrawal which was signed by its Minister of International Relations and Cooperation on 19 October 2016, stated that South Africa 'found that its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the ICC of obligations contained in the Rome Statute of the ICC.' However, in March 2017 South Africa officially withdrew its notice from the ICC, after a High Court decision in February 2017 found the notice unconstitutional. South Africa's instrument of withdrawal available at <https://www.justsecurity.org/wp-content/uploads/2016/10/South-Africa-Instrument-of-Withdrawal->

impunity gap will be created at the international level in the prosecution of SGBCs which occur in armed conflict situations. This would mean resorting to prosecuting SGBCs where possible at the regional level if prosecution is not possible at the domestic level.

This chapter commences by reviewing the Constitutive Act (CA) of the African Union, the legal basis for the creation of the ACJHPR. It is also significant as the AU relies on the CA as justification for its ruling that member states comply with its decision not to cooperate with the ICC's request for the arrest and surrender of President Al-Bashir, Sudan's incumbent head of state.<sup>1086</sup> The chapter argues that AU's concern, right from its establishment, in handling human rights matters, which include SGBCs, is to establish peace and security at the expense of justice in Africa. The AU would rather deal with human rights crimes, which include SGBCs, through peace talks than seek justice through the courts. The chapter also considers the prosecution of SGBV in armed conflict at both the state and individual levels. At the state level, this involves consideration of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (also known as the Maputo Protocol or the African Women's Protocol). At the individual level, this will involve considering the Malabo Protocol. In considering both protocols, attention is drawn to the challenges likely to result in applying them to the prosecution of SGBCs committed in armed conflict at the regional level. This would enable the drafters of the Malabo Protocol to consider amendments to the protocol in order to facilitate the prosecution of these crimes at the regional level.

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[International-Criminal-Court.jpg](#) (accessed 10 March 2017). *Daily Maverick* 'Top SA jurists make the case for the ICC as SA withdraws its original notice of withdrawal' available at <https://www.dailymaverick.co.za/.../2017-03-08-top-sa-jurists-make-the-case-for-the-i> (accessed on 10 March 2017). On 25 October 2016, Gambia declared its intention to withdraw from the ICC. Gambia's information minister stated that the ICC is an 'International Caucasian Court for the persecution and humiliation of people of colour, especially Africans.' In February 2017, Gambia withdrew its notice from the ICC, after there was a change of government in January 2017. Why African states are leaving the ICC available at [www.iol.co.za/news/africa/why-african-states-are-leaving-the-icc-2084346](http://www.iol.co.za/news/africa/why-african-states-are-leaving-the-icc-2084346) (accessed 27 November 2016). *Newsweek* 'Why an African mass withdrawal from the ICC is possible' available at [www.newsweek.com/icc-international-criminal-court-africa-gambia-south-africa-buru](http://www.newsweek.com/icc-international-criminal-court-africa-gambia-south-africa-buru) (accessed 10 March 2017). *Jollofnews* 'Gambia cancels withdrawal from the ICC' available at <https://jollofnews.com/2017/02/13/gambia-cancels-withdrawal-from-the-international-criminal-court/> (accessed 10 March 2017).

<sup>1086</sup> See for example, African Union Press Release N° 002/2012, On the decision of Pre-trial Chamber 1 of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al-Bashir of the Republic of the Sudan.



## 5.2 REGIONAL INSTRUMENTS OF THE AFRICAN UNION RELATING TO SEXUAL AND GENDER-BASED CRIMES COMMITTED IN ARMED CONFLICTS

### 5.2.1 The Constitutive Act of the African Union.

The CA of the African Union is an important regional instrument as it is the legal foundation for the AU, which replaced the Organisation of African Unity (OAU).<sup>1087</sup> Its importance is underlined by the fact that scholars such as Murungu<sup>1088</sup> regard articles 4(h), 4(m) and 4(o) of the CA as forming the legal basis for the creation of the ACJHR.<sup>1089</sup> The CA gives recognition to human rights in armed conflict situations, stating in its preamble and declaration of objectives the need for the AU to ‘promote peace, security and stability on the continent’.<sup>1090</sup> This is the genesis of the AU sequencing peace before justice, illustrated by the resistance to the ICC’s proceeding against Al-Bashir.<sup>1091</sup> Initially the CA provided for

the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.<sup>1092</sup>

The CA’s amendment was by the Protocol on Amendments to the Constitutive Act of the African Union,<sup>1093</sup> which included after the words ‘war crimes, genocide and crimes against

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<sup>1087</sup> Constitutive Act of the African Union, art 2 which provides that ‘[t]he African Union is hereby established in accordance with the provisions of this Act. ’Constitutive Act of the African Union, OAU Doc CAB/LEG/23.15, adopted 11 July 2000 (entered into force May 26, 2001).

<sup>1088</sup> Chacha B Murungu ‘Towards a criminal chamber in the African Court of Justice and Human Rights (2011) 9 *Journal of International Criminal Justice* 1067 at 1080-1081.

<sup>1089</sup> Article 4(m) provides that the ‘Union shall function in accordance with ... respect for democratic principles, human rights, the rule of law and good governance’. Article 4(o) provides that the ‘Union shall function in accordance with ... respect for sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.’

<sup>1090</sup> Constitutive Act of the African Union, preamble and article 3(f).

<sup>1091</sup> Al-Bashir is wanted before the ICC for crimes against humanity, war crimes and genocide. The ICC issued a warrant of arrest for his arrest on 4 March 2009, for five counts of crimes against humanity and two counts of war crimes, which includes torture and rape as crimes against humanity. The second warrant of arrest issued on 12 July 2010 for his arrest and surrender contained three counts of genocide, which includes rape as a type of genocide. *Prosecutor v Omar Hassan Ahmed Al-Bashir* ‘First warrant of arrest for Omar Hassan Ahmed Al-Bashir’ ICC-02/05-01/09-1 (4 March 2009). *Prosecutor v Omar Hassan Ahmed Al-Bashir* ‘Second warrant of arrest for Omar Hassan Ahmed Al-Bashir’ ICC-02/05-01/09-95 (12 July 2010). *Prosecutor v Omar Hassan Ahmed Al-Bashir* ‘Second decision on the Prosecution’s application for a warrant of arrest’ ICC-02/05-01/09 (12 July 2010). The Pre-Trial Chamber had originally refused to grant the genocide counts. The Prosecutor had to appeal against the Pre-Trial Chamber’s decision. The Appeals Chamber on 3 February 2010 reversed the Pre-Trial Chamber’s decision.

<sup>1092</sup> Constitutive Act of the African Union, art 4(h).

<sup>1093</sup> Protocol on Amendments to the Constitutive Act of the African Union, adopted on 11 July 2003. The Protocol was adopted by the First Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia on 3 February 2003 and by the Second Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July 2003. See Refworld/Protocol on Amendment to the Constitutive Act ... available at [www.refworld.org/docid/493fe67d2.html](http://www.refworld.org/docid/493fe67d2.html) (accessed 18 April 2016).

humanity’, the words ‘as well as a serious threat to legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council’.<sup>1094</sup> This additional clause was included to enable the AU to be flexible in deciding when to intervene.<sup>1095</sup> Notably, the CA does not define war crimes, genocide and crimes against humanity, but the Rome Statute provides guidance to the definition of these crimes. The 34 African states parties to the ICC probably intended that the Rome Statute’s definition of these crimes, would also apply to those listed in the CA.<sup>1096</sup> Also, these crimes are similarly defined in the Malabo Protocol in line with the definition given to them in the Rome Statute.<sup>1097</sup> The AU’s office of legal counsel has noted that article 4(h) of the CA ‘provides the basis of the practice of the African Union on universal jurisdiction over war crimes, genocide and crimes against humanity’.<sup>1098</sup>

## 5.2.2 The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

The Maputo Protocol complements the African Charter on Human and Peoples’ Rights and International Human Rights conventions as it ‘focuses on concrete actions and goals to grant women rights’.<sup>1099</sup> The Maputo Protocol came into force on 25 November 2005 after 15 of its 53 member states ratified the Protocol.<sup>1100</sup> The protection of women’s rights and supplementing the

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<sup>1094</sup> *Idem* art 4(h).

<sup>1095</sup> Ben Kioko ‘The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention’ (2003) 85 *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 807 at 812.

<sup>1096</sup> For the list of African states which have ratified the Rome Statute see African group of States – ICC available at <https://www.icc.cpi.int/.../states%20parties/african%20states/.../african%20...> (accessed 20 January 2015). Though the CA came into force on 26 May 2001, it can be assumed that when the Rome Statute was adopted on 17 July 1998, the African member states, which agreed to its adoption, would agree to the contents of the Rome Statute, which include the definition of the crimes contained in the Rome Statute. Kindiki is of the opinion that as the Rome Statute has already defined war crimes, genocide and crimes against humanity, it would be difficult for the AU to develop other definitions. Kithure Kindiki ‘The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal’ (2003) 3 *African Human Rights Law Journal* 97 at 108.

<sup>1097</sup> The Malabo Protocol is not yet in force. See section 5.3.2 with regard to these crimes.

<sup>1098</sup> International criminal justice and Africa, the state of play, Chapter 4 at 26 available at [www.ictj.org/international-crimes](http://www.ictj.org/international-crimes) (accessed on 18 April 2016).

<sup>1099</sup> Mary Wandia ‘Rights of women in Africa: Launch of petition to the African Union’ (3 June 2004) available at <http://www.pambazuka.org/gender-minorities/rights-women-africa-launch-petition-african-union> (accessed 6 December 2016).

<sup>1100</sup> At present 36 member states have signed and ratified the Protocol and 15 member states have signed but not ratified the Protocol. These states are Algeria, Burundi, Central African Republic, Chad, Eritrea, Ethiopia, Madagascar, Mauritius, Niger, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Sierra Leone, Somalia, South Sudan and Sudan. Botswana, Egypt and Tunisia have not signed or ratified the Protocol. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, available at [www.achpr.org/instruments/women.protocol/](http://www.achpr.org/instruments/women.protocol/) (accessed 18 April 2016).

African Charter on Human and Peoples' Rights (the Banjul Charter, ACHPR) informed the implementation of the protocol.<sup>1101</sup>

In contrast to the Banjul Charter, the Maputo Protocol explicitly recognises gender-based violence committed against women in armed conflict situations.<sup>28</sup> The definition 'violence against women' in article 1(J) of the Maputo Protocol, for instance, includes violence committed in 'situations of armed conflicts or of war'. The stated definition of 'violence against women' is:

All acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.<sup>1102</sup>

The Maputo Protocol also dedicates a whole article to the 'protection of women in armed conflicts',<sup>1103</sup> thus incorporating international humanitarian law provisions in the article along with the jurisprudence of international tribunals.<sup>1104</sup> Under article 11(1) of the Maputo Protocol, state parties 'undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women'. In an armed conflict, state parties are enjoined to protect civilians 'irrespective of the population to which they belong'.<sup>1105</sup> This duty arises from international humanitarian law. The protocol specifically mentions that the protection given to civilians extends to women.<sup>1106</sup> Article 11(3) provides for protection from 'all forms of violence, rape and sexual exploitation' of 'asylum-seeking women, refugees, returnees and internally displaced persons' by state parties.<sup>1107</sup> These categories of people often come into being as the after-effect of an armed conflict. The article also provides for finding the perpetrators who shall be liable for the atrocities committed against their victims, which are considered 'war crimes, genocide and/or crimes against humanity'.<sup>1108</sup> Although it *prima facie* appears that these acts can only be committed against the groups of

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<sup>1101</sup> African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, available at University of Minnesota Human Rights Library, 'African (Banjul) Charter on Human and Peoples' Rights ...' available at <https://www1.umn.edu/humanrts/instree/z1afchar.htm> (accessed 12 April 2016).

<sup>1102</sup> The Maputo Protocol also defines 'discrimination against women' under article 1(f).

<sup>1103</sup> Maputo Protocol, art 11.

<sup>1104</sup> Fareda Banda (2008) Protocol to the African Charter on the Rights of Women in Africa in Rachael Murray and Malcolm D Evans (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* at 455 (Cambridge University Press).

<sup>1105</sup> Maputo Protocol, art 11(2).

<sup>1106</sup> *Ibid.*

<sup>1107</sup> *Idem* at art 11(3).

<sup>1108</sup> *Ibid.*

people mentioned in the subsection, the contention is that these acts could also be committed against women in armed conflict situations who fall outside these groups. This is by virtue of the interpretation given to article 11(2), by which states parties have an obligation under international humanitarian law to protect women ‘irrespective of the population to which they belong’.<sup>1109</sup> The last sub-paragraph of article 11 provides that state parties should ensure that children, especially the girl child under 18, do not engage in hostilities and are forcibly recruited as soldiers.<sup>1110</sup>

When the ACJHPR comes into force, the General Affairs Section of the court will be competent to hear cases relating to the Maputo Protocol, which include cases under its article 11 relating to SGBCs in armed conflict situations.<sup>1111</sup> An individual or non-governmental organisation (NGO) with observer status before the AU or its organs or institutions, can bring cases relating to the Maputo Protocol before the General Affairs Section of the ACJHPR.<sup>1112</sup> The Statute of the ACJHPR categorically states that the individual or NGO must be African.<sup>1113</sup> They would only have a right to bring such cases if the member state concerned ‘has made a Declaration accepting the competence of the court to receive cases or applications submitted to it directly’.<sup>1114</sup> In the event of a member state not making a Declaration, according to article 9(3) of the protocol the court will not receive the case or application.<sup>1115</sup> It would be difficult for an individual or NGO in most cases to bring a case or application under the Maputo Protocol challenging a state for SGBCs, as most member states are reluctant to make such a Declaration. With the present African Court, that is the ACHPR; to be taken over by the ACJHPR when it

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<sup>1109</sup> Susana SaCouto and Katherine Cleary ‘The Women’s Protocol to the African Charter and sexual violence in the context of armed conflict or other mass atrocity’ (2009) 16 *Washington & Lee Journal of Civil Rights & Social Justice* 173 at 188. Ntombizuko Dyani ‘Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict’ (2006) 6 *African Human Rights Law Journal* 166 at 181.

<sup>1110</sup> Maputo Protocol, art 11(4).

<sup>1111</sup> Statute of the African Court of Justice and Human and Peoples’ Rights, article 7 replaces article 17, Statute of the African Court of Justice and Human Rights. Article 7 states that article 17 shall read that ‘[t]he General Affairs Section shall be competent to hear all cases submitted under Article 28 of the Statute except those assigned by the Human and Peoples’ Rights Section and the International Criminal Law Section as specified in this Article.’ Under article 28(c) the ACJHPR will have jurisdiction over:

‘The interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;’

<sup>1112</sup> *Idem* at art 16. Article 16 is titled ‘Other entities eligible to submit cases to the court.’

<sup>1113</sup> *Ibid.*

<sup>1114</sup> *Ibid.*

<sup>1115</sup> *Ibid.*

comes into force, the protocol to ACHPR also specifies that a declaration must be made by member states granting NGOs or individuals access to the court.<sup>1116</sup> Since the ACHPR's coming into force on 25 January 2004, only eight member states have made an article 34(6) Declaration, with the Republic of Benin being the most recent member state to lodge its Declaration with the AU's Commission.<sup>1117</sup> At the same time, states tend to withdraw their declarations to limit those who may bring an application or case against them.<sup>1118</sup>

Although the ACJHPR is not yet in force, an international court for the first time has made a pronouncement on the provisions of the Maputo Protocol.<sup>1119</sup> The ECOWAS Community Court of Justice found the Federal Republic of Nigeria had violated articles 2, 3, 4(1), 5, 8 and 25 of the Maputo Protocol,<sup>1120</sup> and other conventions and human rights instruments. Article 2 of the Maputo Protocol provides for the 'elimination of discrimination against women' while article 3 for their 'right to dignity', whilst article 4 provides for one's 'right to life, integrity and security', article 4(1) states that '[e]very woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited'. Article 5 provides for the 'elimination of harmful practices' and article 8 for 'access to justice and equal protection before the law'. Lastly, article 25 provides for remedies, as reflected in the following case. The plaintiffs were wrongfully arrested

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<sup>1116</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), entered into force Jan. 25, 2004. University of Minnesota Human Rights Library, 'Protocol to the African charter on human and peoples' right ....' available at [www.peacewomen.org/.../hr\\_protocoltotheafricancharteronhumanandpe...](http://www.peacewomen.org/.../hr_protocoltotheafricancharteronhumanandpe...) (accessed 12 April 2016). Article 34(6) provides that:

'At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.

Article 5(3) states that:

'The Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.'

<sup>1117</sup> The other states are Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania. Benin deposits article 34(6). Declaration available at [www.africancourtcoalition.org](http://www.africancourtcoalition.org) > In the News (accessed 14 February 2017).

<sup>1118</sup> In 2016, Rwanda withdrew its declaration with the ACHPR claiming that it was to prevent individuals from exploiting its use and [to] avoid the declaration from being used contrary to the intention for why it was made (sic). International Justice Resource Centre 'Rwanda withdraws access to the African Court for individuals and NGOs available at [www.ijrcenter.org/.../rwanda-withdraws-access-to-african-court-for-individuals-and-n](http://www.ijrcenter.org/.../rwanda-withdraws-access-to-african-court-for-individuals-and-n) (accessed 14 February 2017).

<sup>1119</sup> *Dorothy Chioma Njemanze & 3 Others v The Federal Republic of Nigeria*, ECOWAS Community Court of Justice, ECW/CCJ/APP/17/14/ECN/CCJ/JUD/08/17, 12 October 2017.

<sup>1120</sup> *Idem* at 43-45.

by the defendant's agents on the pretext that they were prostituting themselves on the streets at night, in Abuja, Nigeria. They were detained under inhuman conditions and subjected to sexual, physical and verbal abuse. They were neither charged nor offered apologies by the defendant's agents when they were released. The court awarded the first, third and fourth plaintiffs' damages in the sum of 6 million naira each. The court however, dismissed the second plaintiff's claim as statute barred. Although this case did not occur in an armed conflict situation, it is positive news for female victims of SGBV committed in armed conflict, as these victims may also bring their case before the ECOWAS Community Court of Justice against ECOWAS member states, since the court cannot prosecute individuals.

### **5.3 THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS**

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,<sup>1121</sup> adopted by the AU Assembly on June 27, 2014,<sup>1122</sup> amended the Protocol on the Statute of the African Court of Justice and Human Rights (Protocol on ACJHR) at its 11th summit in 2008.<sup>1123</sup> The Protocol on ACJHR provided for the merging of the African Court of Human and Peoples Rights (ACHPR)<sup>1124</sup> and the Court of Justice of the AU<sup>1125</sup> into a single court known as the African Court of Justice and Human Rights (ACJHR).<sup>1126</sup> The merging of these two courts was intended to reduce costs.<sup>1127</sup> The ACJHR consists of a General Affairs

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<sup>1121</sup> The Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), establishes the African Court of Justice and Human and Peoples' Rights. Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art 1. Statute of the African Court of Justice and Human and Peoples' Rights, art 1(3).

<sup>1122</sup> Decision on the Draft Legal Instruments, Dec Assembly/AU/8(XXIII), Decision no Assembly/AU/Dec 529(XXIII), (26-27 June 2014), para 2(e).

<sup>1123</sup> The AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights on July 1, 2008 in Sharm-El-Sheikh, Egypt.

<sup>1124</sup> The Protocol to the African Charter on Human and Peoples' Rights relating to the Establishment of an African Court on Human and Peoples' Rights established the African Court of Human and Peoples' Rights. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

<sup>1125</sup> The CA established the Court of Justice as the principal judicial organ of the African Union. Constitutive Act of the African Union, art 18(1). Protocol of the Court of Justice of the African Union, art 2(2).

<sup>1126</sup> Protocol on the Statute of the African Court of Justice and Human Rights, art 2.

<sup>1127</sup> Fidh International Federation for Human Rights, 'Practical guide, The African Court on Human and Peoples' Rights toward the African Court of Justice and Human Rights,' at 31 and 51 available at [https://www.fidh.org?img?pdf/african\\_court\\_guide.pdf](https://www.fidh.org?img?pdf/african_court_guide.pdf) (accessed 15 April 2016). The decision to merge these two courts was made pursuant to two decisions of the AU. See Assembly of the African Union, Third Ordinary Session, 6-8 July 2004, Addis Ababa, Ethiopia, Decision on the seats of the African Union, Assembly/AU/Dec. 45(III) Rev. 1 at para 3 (The Assembly further decides that the African Court on Human and Peoples' Rights and the Court of Justice should be integrated into one court). See also Assembly of the African Union, Fifth Ordinary Session, 4-5

Section and a Human Rights Section.<sup>1128</sup> The ACJHR is not yet in operation as the number of ratifications required to bring the Protocol on ACJHR and the Statute annexed to it, into force, have not been deposited.<sup>1129</sup> With the amendment of the Protocol on ACJHR by the Malabo Protocol, the name ACJHR changed to the African Court of Justice and Human and Peoples' Rights (ACJHPR).<sup>1130</sup> This new court will consist of three sections: General Affairs, Human and Peoples' Rights and an International Criminal Law Section.<sup>1131</sup> The International Criminal Law Section of the ACJHPR will consist of a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.<sup>1132</sup> As with the Protocol on ACJHR and its statute, the Malabo Protocol's coming into force also depends on 15 member states ratifying it and the statute annexed to it.<sup>1133</sup> So far, only nine member states have signed but not ratified the Malabo Protocol,<sup>1134</sup> thus making the ACHPR the only regional court presently operating in Africa.

This section of this chapter commenced by briefly assessing the genesis of the AU amending the Protocol on ACJHR to include international crimes, which include SGBCs committed in armed conflicts. The argument was that it was not the intention of the AU to prosecute international crimes at the regional level, especially considering that this idea was considered untimely when first broached in the 1980s. Moreover, with the creation of the ACJHR, there was no International Criminal Law Section but a General Affairs and Human Rights Section. Secondly, despite the AU having repeatedly stated its commitment to fighting

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July 2005, Sirte, Libya, Decision on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union – Assembly/AU/6(v) (The Assembly decides that a draft legal instrument relating to the establishment of the merged court comprising the Human Rights Court and the Court of Justice should be completed for consideration by the next ordinary sessions of the Executive Council).

<sup>1128</sup> Statute of the African Court of Justice and Human Rights, art 28(c).

<sup>1129</sup> Protocol on the Statute of the African Court of Justice and Human Rights, art 9. Fifteen ratifications are required. As of 2014 Libya, Mali, Burkina Faso, Benin, Congo, Rwanda and Cote d'Ivoire have ratified the Protocol on ACJHR. SALC Handbook series 'Justice for all: Realising the promise of the Protocol establishing the African Court on Human and Peoples' Rights available at [www.southernafriclitigationcentre.org/.../Justice-for-all-Realising-the-Pr...](http://www.southernafriclitigationcentre.org/.../Justice-for-all-Realising-the-Pr...) (accessed 2 May 2016).

<sup>1130</sup> Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art 1. Statute of the African Court of Justice and Human and Peoples' Rights at art 1(3).

<sup>1131</sup> *Idem* at art 16(1).

<sup>1132</sup> *Idem* at art 16(2).

<sup>1133</sup> *Idem* at art 9.

<sup>1134</sup> As of January 2017, these member states are Benin, Chad, Congo-Brazzaville, Ghana, Guinea-Bissau, Kenya, Guinea, Sierra Leone and Sao Tome and Principe. Chad was the last member state to sign the Malabo Protocol in February 24, 2016. African Union, Draft 2 Withdrawal strategy document at 12 available at [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf) (accessed 16 February 2017).



impunity, it more particularly seeks to promote peace and security rather than justice.<sup>1135</sup> Sequencing peace and security over justice contradicts articles 4(h) and 4(o) of the CA of the AU, condemning and rejecting impunity, and asserting the duty to intervene in situations of crimes against humanity, war crimes and genocide, regardless of the perpetrators' status.<sup>1136</sup> For instance, Thabo Mbeki, as former president of South Africa, in referring to the case against Al-Bashir, stated that Africa's 'first task is in stop[ping] the killings of Africans'. But a challenge arises when the argument is made that the issue of justice is trumped by the issue of peace.'<sup>1137</sup> Salva Kiir, South Sudan's leader said that 'he needs Bashir not in a court room or in jail, but at the negotiating table in order to reach peace in Sudan'.<sup>1138</sup> In the process, no peace deals were reached and there were continued reports of women and girls raped by rebels, government-supported militia and the Sudanese forces.<sup>1139</sup>

In its instrument of withdrawal lodged at the UN in October 2016, South Africa stated that it 'found that its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the International Criminal Court of obligations contained in the Rome Statute'.<sup>1140</sup> Apart from the different instruments stating the AU's emphasis on promoting peace and security, the AU's reluctance to prosecute international crimes

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<sup>1135</sup> Constitutive Act, Preamble (Determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law). African Charter on Human and Peoples' Rights, Preamble (Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa). Protocol on ACJHR, Preamble (Bearing in mind their commitment to promote peace, security and stability on the continent and to protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant instruments relating to human rights). Malabo Protocol, Preamble (Bearing in mind their commitment to promote peace, security and stability on the continent, and to protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant instruments). An exception where the AU did not prefer peace and security over justice is in the armed conflict in South Sudan. The Peace and Security Council of the AU in 2013 ordered a Commission of Inquiry to be established to investigate into and make recommendations on the human right abuses, which included raping of civilians, caused by the power struggle between soldiers loyal to President Salva Kiir and those loyal to the former Vice-President, Dr Rick Machar. This investigation was ordered even though the Intergovernmental Authority on Development (IGAD) was involved in peace talks with both sides. Human Rights Watch 'South Sudan events of 2015' available at <https://www.hrw.org/world-report/2016/country-chapters/south-sudan> (accessed 20 February 2017). The final report of the African Commission of inquiry on South Sudan (15 October 2014) is available at <https://paanluelwel2011.files.wordpress.com/2015/10/final-report-full-report.pdf> (accessed 20 February 2017).

<sup>1136</sup> See footnote 13 above for the text of article 4(0) of the CA of the AU.

<sup>1137</sup> *Al Jazeera* 'Thabo Mbeki: Justice cannot trump peace' available at [www.aljazeera.com/.../thabo-mbeki-justice-cannot-trump-peace-2013112210658783...](http://www.aljazeera.com/.../thabo-mbeki-justice-cannot-trump-peace-2013112210658783...) (accessed 18 February 2017).

<sup>1138</sup> *Ibid.*

<sup>1139</sup> International Bar Association 'Sexual violence in Darfur' (2015) available at [www.ibanet.org/Article/NewDetail.aspx?ArticleUid=8be55dc6-54c1-47ed-a7d8](http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=8be55dc6-54c1-47ed-a7d8) (accessed 18 February 2017).

<sup>1140</sup> The Citizen 'SA pulling out of the International Criminal Court' available at <http://citizen.co.za/news/news-national/1321724/sa-pulling-out-of-international-criminal-court/> (accessed 20 February 2017).



is apparent as gleaned from the difficulty individuals and NGOs experience on prosecuting SGBCs – as with other cases provided for by the Maputo Protocol before the ACHPR, which is still in force, and the ACJHPR, if it should start operating. Most African states participated in the drafting of the Rome Statute in 1998 at the Rome Conference<sup>1141</sup> and 34 out of the 47 African states represented<sup>1142</sup> ratified the Rome Statute under which they expected the ICC to prosecute crimes of most serious concern to the international community, and which included SGBCs in armed conflicts.<sup>1143</sup> In any event, as the prosecution of SGBCs in armed conflicts was the primary duty of states, and the ICC would only prosecute these crimes as a last resort, there was no need to establish an international criminal court at the regional level.<sup>1144</sup> The next section reviews the Malabo Protocol with regard to SGBCs in armed conflict situations.

### **5.3.1 The genesis leading to the prosecution of international crimes by the African Court of Justice and Human and Peoples' Rights**

Scholars such as Murungu have mistakenly claimed that the quest for a human rights and an international criminal court at the regional level in Africa was due to the indictment and prosecution of senior African state officials by certain European domestic courts, and/or by the ICC,<sup>1145</sup> pushing the AU to act in establishing an international criminal court. Apparently, discussions within the AU to have a court in Africa to try international law crimes first occurred in the 1980s<sup>1146</sup> during the drafting of the African Charter on Human and Peoples' Rights. Although Guinea then initiated this proposal, discussions on establishing an African Court to try international crimes on the continent arose again in January 2006 when the AU Assembly set up a committee to advise on issues relating to the case against Chad's former President, Hissene

<sup>1141</sup> Hassan Jallow and Fatou Bensouda *International Criminal Law in an African Context* in Max du Plessis (ed) *African Guide to International Criminal Justice* 15 at 41 (Institute for Security Studies).

<sup>1142</sup> States parties to the Rome Statute of the International Criminal Court, available at <https://asp-icc-cpi.int/.../states%20parties/.../the%20states%20parties%20to%20the%20...> (accessed 20 January 2015). Coalition for the International Criminal Court 'Africa and the International Criminal Court', available at [http://www.iccnw.org/documents/Africa\\_and\\_the\\_icc.pdf](http://www.iccnw.org/documents/Africa_and_the_icc.pdf) (accessed on 29 June 2016).

<sup>1143</sup> See Press conference by the President of the Assembly of States Parties, H. E. Mr Sidiki Kaba on the withdrawal from the Rome Statute at 9 (24 October 2016) available at [https://asp-icc-cpi.int/iccdocs/.../PASP-Press\\_Conference\\_\(24Oct2016\)-ENG-transcript.p](https://asp-icc-cpi.int/iccdocs/.../PASP-Press_Conference_(24Oct2016)-ENG-transcript.p) (accessed 14 February 2017) (stating that the reason why African states decided to join the ICC is because 'justice can play a role in the resolution of the crisis situations which prevail in almost all African regions. The International Criminal Court gives hope that those responsible for these crises will be prosecuted').

<sup>1144</sup> Rome Statute, art 17.

<sup>1145</sup> Murungu 'Towards a Criminal Chamber' at 1068 and 1077-8.

<sup>1146</sup> Abass 'Prosecuting International crimes in Africa' at 936. Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly 'Africa and the International Criminal Court' (2013) available at [https://www.chathamhouse.org/sites/files/.../International%20Law/0713pp\\_iccafrica.p...](https://www.chathamhouse.org/sites/files/.../International%20Law/0713pp_iccafrica.p...) (accessed 2 May 2016).

Habre. In its report, the Committee of Eminent African Jurists recommended ‘the possibility of conferring criminal jurisdiction on the African Court of Justice . . . to make the respect for human rights at national, regional and continental levels a fundamental tenet for African governance’.<sup>1147</sup> In February 2009, whilst expressing its regret at the warrant of arrest issued against the Chief of Protocol for Rwanda, Mrs Rose Kabuyethe, the AU Assembly sought the establishment of the AU Commission:

. . . in consultation with the African Commission on Human and Peoples’ Rights, and the African Court on Human and Peoples’ Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes and report thereon to the Assembly in 2010.<sup>1148</sup>

In that same year, the AU Assembly, in expressing its concern about the effect the indictment issued against Al-Bashir would have on the peace processes being carried out, requested the Commission to:

[E]nsure the early implementation of Decision Assembly/Dec. 213(XII), adopted in February 2009 mandating the Commission, in consultation with the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity.<sup>1149</sup>

Another decision, taken by the AU Assembly in July 2010, requested that the AU Commission ‘finalise its study on the implications of empowering the African Court on Human and Peoples’ Rights to try international crimes’. It also requested the commission to submit a ‘report to the next Ordinary Session of the Assembly through the Executive Council in January/February 2011’.<sup>1150</sup> The AU Commission employed a team of experts to draft a Protocol, which would expand the ACJHR’s jurisdiction to include international crimes. The AU government, experts, and ministers of justice and lawyers adopted the draft Protocol in May 2012 after experts had

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<sup>1147</sup> *Idem* at 8. Murungu ‘Towards a Criminal Chamber’ at 1075. Abass ‘Prosecuting International crimes in Africa’ at 919.

<sup>1148</sup> Assembly/AU/DEC. 213(XII), Assembly of the African Union, Decision on the implementation of the Assembly decision on the abuse of the principle of Universal jurisdiction, Doc Assembly/AU/3(XII), Twelfth Ordinary Session, 1-3 February 2009, Addis Ababa, Ethiopia.

<sup>1149</sup> Assembly/AU/Dec.245(XIII) Rev 1, Assembly of the African Union, Decision on the meeting of African States Parties to the Rome Statute of the ICC, Doc. Assembly/AU/13(XIII), Thirteenth Ordinary Session, 1-3 July 2009, Sirte, Great Socialist People’s Libyan Arab Jamahiriya.

<sup>1150</sup> Assembly/AU/Dec.292 (XV), Decision of the abuse of the principle of Universal Jurisdiction, Doc. EX.CL/606(XVII), Assembly of the African Union, Fifteenth Ordinary Session, 25-27 July 2010, Kampala, Uganda.

considered the various revisions of the draft at different workshops.<sup>1151</sup> In June 2014, the African Union Assembly adopted the final version of the Malabo Protocol.

### **5.3.2 Crimes within the jurisdiction of the International Criminal Law Section of The African Court of Justice and Human and Peoples' Rights.**

Article 28A of the statute of the ACJHPR lists 14 international and transnational crimes, which the ACJHPR would have power to prosecute<sup>1152</sup> once its Protocol and annexed Statute came into force. These crimes include genocide, crimes against humanity and war crimes. There should be coordinated arrangements for SGBCs to be prosecuted as genocide, crimes against humanity and war crimes.<sup>1153</sup> Genocide was defined largely in the same way as in the Rome Statute except for the addition of a subsection '[a]cts of rape or any other form of sexual violence' not included under the genocide article in the Rome Statute.<sup>1154</sup> The addition of the words '[a]cts of rape or any other form of sexual violence' indicates that the AU appreciated the decision in the case of *Prosecutor v Akayesu*, relating to rape and sexual violence. The ICTR stated that rape could constitute genocide when it was 'committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such'.<sup>1155</sup> Ambos is of the opinion that the additional subparagraph does not add value to the traditional scope of genocide crimes. She argues that 'rape or any other form of sexual violence' are already covered under subparagraph (b), that is, 'causing serious bodily or mental harm to members of the group', and under subparagraph (d), that is, 'imposing measures intended to prevent births within the group'.<sup>1156</sup> Although Ambos draws one's attention to this fact, this additional subparagraph not only explicitly refers to rape and sexual violence, but also takes into account the argument of feminist scholars for the recognition of these crimes as distinct crimes on their own right.<sup>1157</sup> Ambos is also of the opinion, that the drafters of the Malabo Protocol should have added the term 'political groups' in

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<sup>1151</sup> Meeting of Government Experts and Ministers of Justice/Attorneys, General on Legal Matters 7 to 11 and 14 to 15 May 2012, Addis Ababa, Ethiopia, 'Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,' Exp/Min/IV/Rev.7. Article 28E which relates to the crime of unconstitutional change of government was not adopted.

<sup>1152</sup> Malabo Protocol, art 28A(1).

<sup>1153</sup> *Idem* at arts 28B (Genocide), 28C (Crimes against Humanity), and 28D (War Crimes)

<sup>1154</sup> *Idem* at arts 28B and 28B(f).

<sup>1155</sup> *Prosecutor v Akayesu* (Trial Judgment) Case No ICTR-96-4, Sept 2, 1998, paras 731 and 734.

<sup>1156</sup> Kai Ambos (2017) Genocide (Article 28B), Crimes against Humanity (article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M), in Werle G., Vormbaum M. (eds) *The African Criminal Court. International Criminal Justice Series*, vol 10. T.M.C. Asser Press, The Hague, 31 at 39.

<sup>1157</sup> See for example chapter 2 regarding the argument made by feminist scholars such as Kathleen M Pratt and Laurel E Fletcher 'Time for justice: The case for the international prosecutions of rape and gender-based violence in the former Yugoslavia' (1994) 9 *Berkeley Women's Law Journal* 77 at 81.

the genocide section, as this would have addressed the demands of human rights advocates to have this group included. Adding ‘political groups’ to the genocide aegis would have aligned the protocol with domestic legislation, such as in Columbia,<sup>1158</sup> Côte d’Ivoire and Ethiopia.<sup>1159</sup> It would be appropriate to include ‘political groups’ in the Malabo Protocol as ‘political groups’ in Africa have historically been targets of genocidal attacks through widespread rape. The 2002 attacks perpetrated in the Ituri region of the DRC against the Lendu ethnic tribe and other political opponents by rape and other inhumane acts by armed groups is an example of this.<sup>1160</sup>

The definition of crimes against humanity is also very similar to that of the Rome Statute, except for the word ‘enterprise’, included in its descriptive paragraph.<sup>1161</sup> The article does not define what would constitute an enterprise. Under its list of what acts could constitute crimes against humanity, the article not only lists ‘[t]orture’ in article 28C(1)(f) but also adds the words ‘cruel, inhuman and degrading treatment or punishment’. Though torture is defined in article 28C(2)(e), no definition is given for these additional crimes. ‘Cruel, inhuman and degrading treatment or punishment’ are additional to the acts provided for in article 7(f) of the Rome Statute, which only mentions ‘torture’. Additionally, the ICC’s ‘Elements of Crime’ provides the elements for the war crimes of inhuman treatment, cruel treatment and outrages upon personal dignity.<sup>1162</sup>

The definition of war crimes under article 28D in the Malabo Protocol is largely similar to the definition of war crimes in the Rome Statute. In the Malabo Protocol war crimes refers to ‘any of the offences listed, in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes’.<sup>1163</sup> The phrase ‘in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes’ was included in the Rome Statute’s definition of war crimes as a compromise after heated debate by delegates at the Rome

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<sup>1158</sup> See article 101 of the Criminal Code of Columbia. Kai Ambos ‘Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)’ at 40.

<sup>1159</sup> Although Côte d’Ivoire includes ‘political groups’ in its domestic legislation, ‘racial groups’ is omitted. See article 137 of the Code Penal. With regard to Ethiopia, see article 269 of the Criminal Code.

<sup>1160</sup> Democratic Republic of Congo – Page 1

<sup>1161</sup> Article 28(C)(1) provides that ‘[f]or the purposes of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack or *enterprise* directed against any civilian population, with knowledge of the attack or *enterprise*: (emphasis added).

<sup>1162</sup> ICC Elements of Crime, war crime of inhuman treatment art 8(2)(a)(ii) – 2, war crime of cruel treatment art 8(2)(c)(i) – 3, war crime of outrages upon personal dignity art 8(2)(c)(ii).

<sup>1163</sup> Malabo Protocol, art 28D

Conference.<sup>1164</sup> It was agreed that the ‘plan, policy and scale are not elements or jurisdictional pre-requisites for war crimes’.<sup>1165</sup> Instead ‘they are factors which may be taken into account by the Prosecutor in determining whether or not to begin investigations concerning an alleged war criminal’.<sup>1166</sup> Nothing suggests that the drafters of the Malabo Protocol intended that this phrase should bear the same interpretation as that of the Rome Statutes. Ambos points out that the drafters of the Malabo Protocol should have seized the opportunity to exclude this controversial phrase from the Malabo Protocol, as it was an ‘unnecessary limitation of the war crimes provision, and one not required by international (humanitarian) law’.<sup>1167</sup> The drafters of the Malabo Protocol would not have been expected to have made the distinction between international armed conflict and non-international armed conflict in article 28D of the Malabo Protocol, especially as African delegates at the Rome Conference were in favour of having it removed.<sup>1168</sup> Scholars such as Jalloh view this distinction as an archaic legal one which gives importance to the nature of the conflict rather than the gravity of the crime.<sup>1169</sup> As pointed out by Ambos, most of the crimes listed in article 28D are defined as crimes occurring both in the context of an international and non-international armed conflict, thus making the distinction irrelevant.<sup>1170</sup> As a result there is a ‘common category of armed conflict crimes’.<sup>1171</sup> Although one may assume that article 28D provides for a ‘common category of armed conflict crimes’ – those crimes which are common to both types of armed conflict – it would avoid confusion if the Malabo Protocol is amended to reflect this.

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<sup>1164</sup> Krut Dormann ‘War crimes under the Rome Statute of the International Criminal Court with special focus on the negotiations on the elements of crimes’ (2003) 7 *Max Planck Yearbook of the United Nations Law* 341 at 349.

<sup>1165</sup> *Ibid.*

<sup>1166</sup> *Ibid.*

<sup>1167</sup> Kai Ambos ‘Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)’ at 42.

<sup>1168</sup> Charles Jalloh ‘Regionalizing International Criminal Law?’ (2009) 9 *International Criminal Law Review* 445 at 475.

<sup>1169</sup> *Ibid.* See also Deidre Willmott ‘Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court’ (2004) 5 *Melbourne Journal of International Law* 1 at 3.

<sup>1170</sup> Kai Ambos ‘Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)’ at 48. In referring to the Rome Statute, Jalloh also pointed out that it was unnecessary for the Statute to distinguish between international and non-international armed conflicts. He went on to state that the ‘codification of the relevant war crimes in a single place, effectively renders the distinction nugatory in the legal regime applicable before the International Criminal Court. Charles Jalloh ‘Regionalizing International Criminal Law?’ at 475.

<sup>1171</sup> *Ibid.*

Apart from the new category of armed conflict titled ‘nuclear weapons or weapons of mass destruction’, there are four different categories of war crimes in the Malabo Protocol, which are similar to those in the Rome Statutes. These categories are:

- Grave breaches of the Geneva Conventions of 12 August 1949<sup>1172</sup>;
- Grave breaches of the First Additional Protocol to the Conventions of 8 June 1977 and other serious violations of the laws and customs applicable in international armed conflict<sup>1173</sup>;
- Serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, which applies in a non-international armed conflict situation;<sup>1174</sup> and
- Other serious violations of the laws of customs applicable in armed conflicts not of an international character.<sup>1175</sup>

Article 28(D)(b), that is, the ‘[g]rave breaches of the First Additional Protocol to the Conventions of 8 June 1977 category’, contains an additional list of seven war crimes, not contained in the Rome Statute, which apply in an international armed conflict context.<sup>1176</sup> They derive their legal basis from the 1907 Hague Conventions, the Four Geneva Conventions and the Additional Protocol I.

These crimes are:

- Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated;<sup>1177</sup>
- Unjustifiably delaying the repatriation of prisoners of war or civilians;<sup>1178</sup>
- Wilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;<sup>1179</sup>
- Making non-defended localities and demilitarised zones the object attack;<sup>1180</sup>

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<sup>1172</sup> This applies to grave breaches committed in the context of an international armed conflict. Article 28D(a) Malabo Protocol. The corresponding article in the Rome Statute is article 8(2)(a).

<sup>1173</sup> Malabo Protocol, art 28D(b). The corresponding article in the Rome Statute is article 8(2)(b). Though the phrase, ‘grave breaches of the First Additional Protocol to the Conventions of 8 June 1977’ is not mentioned in article 8(2)(b) Rome Statute the crimes under this article are a reproduction from this and other Conventions. Krut Dormann ‘War crimes under the Rome Statute of the International Criminal Court’ at 344.

<sup>1174</sup> Malabo Protocol, art 28D(c). The corresponding article in the Rome Statute is article 8(2)(c).

<sup>1175</sup> Malabo Protocol, art 28D(e). The corresponding article in the Rome Statute is article 8(2)(e).

<sup>1176</sup> Malabo Protocol, art 28D(b).

<sup>1177</sup> Malabo Protocol, art 28D(b)(v).

<sup>1178</sup> Malabo Protocol, art 28D(b) (xxviii).

<sup>1179</sup> Malabo Protocol, art 28D(b) (xxix).

- Slavery and deportation to slave labour;<sup>1181</sup>
- Collective punishments;<sup>1182</sup>
- Despoliation of the wounded, sick, shipwrecked or dead.<sup>1183</sup>

Of these seven crimes<sup>1184</sup> '[s]lavery and deportation to slave labour' is especially relevant to the prosecution of SGBCs as it is based on article 13 of the third Geneva Convention, which provides for the 'humane treatment of prisoners'; as is article 62 of the same Convention, which provides that '[p]risoners of war shall be paid a fair working rate of pay by the detaining authorities direct',<sup>1185</sup> based on article 6 of the annex to IV Hague Convention regarding excessive tasks imposed on prisoners of war.<sup>1186</sup> Article 28D(b)(xxvii) of the Malabo Protocol which refers to '[c]onscripting or enlisting children under the age of 18 years into the national armed forces or using them to participate actively in hostilities' in an international armed conflict is also relevant to SGBCs. It differs from article 8(2)(b)(xxvi) of the Rome Statute, which provides for '[c]onscripting or enlisting children' in an international armed conflict situation, as the age specified in the Malabo Protocol for the conscription or enlisting children is higher than that specified in the Rome Statute. Under the Malabo Protocol it is an offence to conscript or enlist children under the age of 18 years, whilst the Rome Statute specifies 'under the age of 15 years'.<sup>1187</sup> However, as with the Rome Statute, which makes 'conscription or enlisting of children . . . into the national armed forces an offence, the drafters of the Malabo Protocol ought to have seized the opportunity to include non-state actors such as militia groups as potential perpetrators of this crime.<sup>1188</sup> Article 28D(b)(xxvii) of the Malabo Protocol differs from its article 28D(e)(vii), which also refers to '[c]onscripting or enlisting children under the age of eighteen years' but 'into armed forces or groups . . .' applicable to non-international armed

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<sup>1180</sup> Malabo Protocol, art 28D(b) (xxx).

<sup>1181</sup> Malabo Protocol, art 28D(b) (xxxi).

<sup>1182</sup> Malabo Protocol, art 28D(b) (xxxii).

<sup>1183</sup> Malabo Protocol, art 28D(b) (xxxiii).

<sup>1184</sup> Malabo Protocol, art 28D(b) (xxxi).

<sup>1185</sup> Geneva Convention III relative to the Treatment of Prisoners of War of 12 August 1949. See also Kai Ambos *Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)* at 46.

<sup>1186</sup> Article 6 annex to the Hague Convention IV, Regulations respecting the laws and customs of war on land. Kai Ambos *Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)* at 44.

<sup>1187</sup> Rome Statute, art 8(2)(b)(xxvi).

<sup>1188</sup> Kai Ambos *Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)* at 46.

conflict. Thus, under the Malabo Protocol, the prosecutor can only prosecute non-state actors who conscript or enlist children in a non-international armed conflict situation, as the reference to ‘groups’ in article 28D(e)(vii) is to non-state actors.

Article 28D(e) also provides seven additional crimes to those provided in the Rome Statute, but applicable in a non-international armed conflict context. They derive their legal base from the Geneva Conventions, Hague Convention and the Additional Protocol II. These crimes are:

- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies;<sup>1189</sup>
- Utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;<sup>1190</sup>
- Launching an indiscriminate attack resulting in death or injury to incidental civilian loss, injury or damage; or an attack in the knowledge that it will cause excessive *loss* of life, *injury* to civilians or damage to *civilian* objects;<sup>1191</sup>
- Making non-defended localities and demilitarised zones the object of attack;<sup>1192</sup>
- Slavery;<sup>1193</sup>
- Collective punishments;<sup>1194</sup>
- Despoliation of the wounded, sick, shipwrecked or dead.<sup>1195</sup>

Of relevance to the prosecution of SGBCs is the crime of slavery. Its legal basis is derived from articles 13 and 62 of the Geneva Convention III,<sup>1196</sup> and from article 4(2)(f) of the Additional Protocol II.<sup>1197</sup> However, slavery would be of a sexual nature where the perpetrator has caused a person to engage in such acts.<sup>1198</sup> To assist the ACJHPR with interpreting and applying crimes of genocide, crimes against humanity and war crimes in SGBV cases committed in armed conflict

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<sup>1189</sup> Malabo Protocol, art 28D(e)(xvi).

<sup>1190</sup> Malabo Protocol, art 28D(e)(xvii).

<sup>1191</sup> Malabo Protocol, art 28D(e)(xviii).

<sup>1192</sup> Malabo Protocol, art 28D(e)(xix).

<sup>1193</sup> Malabo Protocol, art 28D(e)(xx).

<sup>1194</sup> Malabo Protocol, art 28D(e)(xxi).

<sup>1195</sup> Malabo Protocol, art 28D(e)(xxii).

<sup>1196</sup> See footnote 112 above.

<sup>1197</sup> Article 4(2)(f) of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (prohibits at any time and at any place whatsoever slavery and the slave trade in all their forms). Kai Ambos ‘Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)’ at 47.

<sup>1198</sup> Though the elements of crimes for sexual slavery have not been defined in the Malabo Protocol it would more probably be the same as that of the Rome Statute’s. See chapter 2, section 2.5.2(ii).



situations, the ACJHPR will need to rely on an Elements of Crimes document, just as the ICC has done.<sup>1199</sup>

The other crimes that the ACJHPR will have jurisdiction to prosecute are crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.<sup>1200</sup> Abass, points out that although genocide, crimes against humanity and war crimes are serious crimes, they are not committed on a frequent enough basis to be compared to other ‘ubiquitous and ongoing crimes’ such as piracy, internet frauds and trafficking of children and women, which affect many states in Africa and are in urgent need of consideration by the international criminal jurisdictions.<sup>1201</sup> Although Abass’s view may be correct, if these crimes are given more consideration than those of genocide, crimes against humanity and war crimes, there is the danger that SGBCs will be considered to be crimes of secondary importance and become marginalised.<sup>1202</sup> This will be a regression to the days when SGBCs were not recognised in their own right. Article 46C of the statute of the ACJHPR also provides for corporate criminal liability.<sup>1203</sup> In the prosecution of SGBCs, invoking this article is imperative where armed groups are funded by corporations involved in illegal exploitation of conflict minerals such as gold, tantalum, tin and tungsten.<sup>1204</sup>

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<sup>1199</sup> See Rome Statute art 9(1). In addition, article 21(1) of the Rome Statute also provides in relation to the documents the ICC relies on that, the Court should ‘apply in the first place, the Rome Statute [*sic*], Elements of Crimes and its rules of Procedure and Evidence.’ This order of relying on which documents or law to be first applied could also be applicable for the international criminal court section of the ACJHPR once it drafts an Elements of Crimes and rules of Procedure and Evidence documents.

<sup>1200</sup> Statute of the African Court of Justice and Human and Peoples’ Rights, arts 28A(1)(4)-(14). Though the Statute of the ACJHPR define these transnational crimes, some of them such as the unconstitutional change of government and the illicit exploitation of natural resources are not defined under international law.

<sup>1201</sup> Ademola Abass ‘The proposed international criminal jurisdiction for the African Court: some problematical aspects’ (2013) 60 *Netherlands International Law Review* 27 at 36-37.

<sup>1202</sup> Sirleaf is of the opinion that there could be a division of labour between the ICC and the ACJHPR. Sirleaf suggests that the ICC should focus on ‘crisis crimes’ that is those crimes within the ICC’s jurisdiction, whilst the ACJHPR focuses on the more ‘quotidian crimes.’ Her reasoning for this is to allow the ICC to concentrate on the crimes within its jurisdiction, thus allowing the ICC to ‘dedicate its limited resources more effectively.’ Following Sirleaf’s suggestion will still marginalise SGBCs at the regional level, which means that the reason for considering closing the impunity gap for SGBCs at the regional level would be defeated. Matiangai V S Sirleaf ‘Regionalism, regime complexes and the crisis in international criminal justice’ (2016) 54 *Columbia Journal of Transnational Law* 699 at 760. Matiangai V S Sirleaf ‘The African Justice Cascade and the Malabo Protocol’ (2017) 11 *International Journal of Transitional Justice* 1 at 29.

<sup>1203</sup> Statute of the African Court of Justice and Human and Peoples’ Rights, art 46C.

<sup>1204</sup> *Idem* art 28L bis could also be used to prosecute individuals where SGBCs in-armed conflict arises because of illicit exploitation of natural resources. Conflict minerals in eastern DRC, helped sustain armed groups and continues to do so. As far back as 2008, armed groups made an estimated \$185 million from conflict minerals.

Apart from the fact that the ACJHPR will have jurisdiction to try a wide range of crimes, its statute provides for the incorporation of ‘additional crimes to reflect developments in international law’.<sup>1205</sup> Prosecuting a wide range of crimes and adding more crimes to the jurisdiction of the ACJHPR will result in strain on its human resources but also constraints on the number of cases it can prosecute, as prosecutions are costly in terms of time and time and resources. This would mean that the OTP of the ACJHPR would have to prioritise prosecutions, which in turn would limit the number of SGBCs that it investigates and takes to trial. In addition to this, the judges assigned to each chamber will be overburdened, as there would be not enough judges to handle the volume of cases assigned to each chamber. For instance, the ACJHPR’s International Criminal Law Section will only have nine judges assigned to it. One judge will sit in the Pre-Trial Chamber, three judges in the Trial Chamber and five judges in the Appellate Chamber.<sup>1206</sup> Experience has also shown the necessity of having competent and experienced investigative teams to handle SGBCs. Cases such as *Prosecutor v Akayesu* tried by the International Criminal Court for Rwanda (ICTR) and *Prosecutor v Mathieu Chui* tried by the ICC illustrate of this proposition.<sup>1207</sup>

Prosecuting SGBCs is time-consuming, as they are amongst the most difficult crimes to prosecute, presenting ‘many challenges and obstacles in the way of the effective investigation and prosecution’<sup>1208</sup>. The ICC, for instance, which has jurisdiction to try a smaller range of international crimes on a wider geographical reach than that of the ACJHPR’s international

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Enough Project ‘Progress and challenges on conflict minerals: facts on Dodd-Frank 1502’ available at [www.enoughproject.org/files/Progress%20and%20Challenges.pdf](http://www.enoughproject.org/files/Progress%20and%20Challenges.pdf) (accessed 14 February 2017).

<sup>1205</sup> *Idem* art 28(A)(2) provides that ‘[t]he Assembly may extend upon the consensus of State Parties the jurisdiction of the court to incorporate additional crimes to reflect developments in international law.’

<sup>1206</sup> Malabo Protocol, article 10.

<sup>1207</sup> In the former case, Judge Navanethem Pillay’s questioning of a witness revealed that rapes had taken place in the Taba commune of which the accused was the *bourgmestre*. Judge Pillay adjourned the trial to allow the prosecution to investigate the allegations of rape, which arose from the questioning of the witness. *Prosecutor v Mathieu Chui* case was one of the many cases before the ICC, where the judges went into depth pointing out the flaws in the Prosecutor’s investigations, which should not have occurred, thus resulting in the acquittal of the accused from all charges, brought against him.

<sup>1208</sup> Some of these challenges and obstacles ‘include the under or non-reporting owing to societal, cultural, or religious factors, stigma for victims; limited domestic investigations, and the associated lack of forensic or other documentary evidence owing *inter alia* to the passage of time, and inadequate or limited support services at national level.’ ICC, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para 3 and Executive Summary para 4 available at [www.icc.cpi.int/.../OTP-Policy-Paper-on-Sexual-and-Gender-Based-Cri...](http://www.icc.cpi.int/.../OTP-Policy-Paper-on-Sexual-and-Gender-Based-Cri...) (accessed 25 October 2016).

criminal law section, spent over US\$ 1 billion on its first two successful convictions,<sup>1209</sup> and this after 12 years of the ICC being in force.<sup>1210</sup> The ICC is funded by the Assembly of State Parties, individuals, and international corporations and organisations.<sup>1211</sup> It is possible that some states, which ratify the Malabo Protocol and are already ICC member states, would find it difficult to meet their financial contributions, as this is already occurring with member states' financial commitments to the African Union. By the end of 2015, for instance, only 19 African Union member states 'had fully met their obligations to the Union, while 35 member states were in arrears with 14 member states having already been in arrears as at 31 December 2014.'<sup>1212</sup> The ICC, which has a smaller range of crimes to try compared with the ACJHPR, is burdened with outstanding contributions from certain state members to the court's regular budget and contingency fund.<sup>1213</sup> Of concern is that the ACJHR, like the ICC would face similar financial challenges, but on a larger scale. In addition, the ACJHR may not be able to obtain as much finance as the ICC has been able to raise from other entities. One of the ways, which the OTP of the ACJHPR could reduce its financial cost would be by investigating SGBCs concurrently with other crimes within its jurisdiction, just as the OTP of the ICC has undertaken to do. This method not only ensures that resources are efficiently utilised, but also enables sufficient time to be given to collecting and analysing evidence, planning of cases and decision-making, as well as identifying and selecting witnesses.<sup>1214</sup>

The OTP of the ACJHPR should take its cue from the ICC's OTP 2016-2018 strategy in prosecuting cases to forestall the marginalisation of the prosecution of SGBCs at the regional

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<sup>1209</sup> These cases were *Prosecutor v Thomas Lubanga Dyilo* and *Prosecutor v Germain Katanga*. Lubanga was found guilty on 14 March 2012 and Katanga on 7 March 2014. Their convictions did not relate to sexual and gender-based crimes.

<sup>1210</sup> David Davenport 'International Criminal Court: 12 years, \$1 billion, 2 convictions' (2014) available at [www.forbes.com/.../12/international-criminal-court-12-years-1-billion-2-convictions](http://www.forbes.com/.../12/international-criminal-court-12-years-1-billion-2-convictions) (accessed 10 February 2017). The ICC's budgetary request for 2016 to run the Office of the Prosecutor was 6.47 million euros, an increase of 16.4 per cent from the previous year, whilst its request for the judiciary was 6.70 million euros an increase of 5.6 per cent from the previous year. The Committee on Budget and Finance recommended a 3,839,400-euro increase for the Office of the Prosecutor and a 429,900 increase for the judiciary. Global Justice 'ASP 14: Negotiating the 2016 International Criminal Court budget', available at [https://iccgglobaljustice.wordpress.com/.../asp14\\_the\\_courts\\_budget\\_for\\_2...](https://iccgglobaljustice.wordpress.com/.../asp14_the_courts_budget_for_2...) (accessed 14 May 2016).

<sup>1211</sup> African Business Magazine 'Who pays for the ICC?' (2011) available at [www.africanbusinessmagazine.com/uncategorised/who-pays-for-the-icc/](http://www.africanbusinessmagazine.com/uncategorised/who-pays-for-the-icc/) (accessed 11 November 2016).

<sup>1212</sup> 2017 Budget Overview Paper – Pan African Parliament available at [www.panafricanparliament.org/.../documents...au-2017-budget-overview-paper.../file](http://www.panafricanparliament.org/.../documents...au-2017-budget-overview-paper.../file) (accessed 14 May 2018).

<sup>1213</sup> ICC Assembly of State Parties, Report of the Committee on Budget and Finance on the work of its Twenty-seventh Session, ICC-ASP 15/15 (28 October 2016) paras 16 -22.

<sup>1214</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes at para 49.

level. The first strategic plan of relevance to SGBCs relating to armed conflicts is a prosecutorial policy involving the OTP of the ACJHPR taking an in-depth, open-ended approach to investigations, while maintaining its focus. As described by the ICC's OTP, this means identifying

[a]lleged crimes (or incidents) to be investigated within a wide range of incidents. Following this meticulous process, alleged perpetrators are identified based on the evidence collected. This approach implies the need to consider multiple alternative case hypotheses and to consistently and objectively test case theories against the evidence – incriminating and exonerating – and to support decision-making in relation to investigations and prosecutions.<sup>1215</sup>

The second prosecutorial policy strategy would be for the OTP of the ACJHPR to be 'as trial-ready as possible from the earliest phases of proceedings, such as when seeking an arrest warrant and no later than the confirmation-of-charges hearing.'<sup>1216</sup> Thus, the OTP would only issue an arrest warrant or summons to appear 'if there are sufficient prospects to further collect evidence to be trial-ready within a reasonable timeframe'.<sup>1217</sup> The third prosecutorial policy which the OTP of the ACJHPR could consider would be prosecuting perpetrators starting from the mid to high-level to enable it convict those most responsible for the crime.<sup>1218</sup>

Another strategic plan, which the OTP of the ACJHPR might adopt for the investigation and prosecution of SGBCs would be to 'integrate a gender perspective in all areas of the office's work to implement the policies in relation to sexual and gender-based crimes'.<sup>1219</sup> This is the second strategic goal of the ICC OTP's 2016-2018 strategic plan. The only reference in the Malabo Protocol to gender issues is in the statute of the ACJHPR which states that 'the Assembly shall ensure that there is equitable gender representation in the court',<sup>1220</sup> which could be read as referring to the staff and judges employed at the ACJHPR. By integrating a gender perspective, the OTP would be:

... committed to integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for

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<sup>1215</sup> ICC-OTP, Strategic Plan| 2016-2018 at 15.

<sup>1216</sup> *Ibid.*

<sup>1217</sup> *Idem* at 15 and 16.

<sup>1218</sup> *Idem* at 16.

<sup>1219</sup> *Idem* at 6 and 19.

<sup>1220</sup> Statute of the African Court of Justice and Human and Peoples' Rights, art 2(4).

staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their families and communities.<sup>1221</sup>

The OTP of the ACJHPR will also have ‘to ensure that its activities do not cause harm to victims and witnesses.’<sup>1222</sup> It would need to

pay particular attention to SGBC from the earliest stages to address specific challenges posed to the investigation and prosecution of these crimes, including under or non-reporting owing to societal, cultural or religious factors.<sup>1223</sup>

Within its mandate, the OTP of the ACJHPR will need to ‘apply a gender analysis to all crimes within its jurisdiction’,<sup>1224</sup> and must also ‘bring charges for SGBCs wherever there is sufficient evidence to support such charges’,<sup>1225</sup> thus avoiding the mistake made by the Prosecutor of the ICC by not bringing charges for SGBCs in the *Prosecutor v Thomas Lubanga Dyilo* case.

The ICC’s OTP adopted as its strategic goal 5 ‘a basic size which can respond to the demands placed upon the office so that it may perform its functions with the required quality, effectiveness and efficiency’.<sup>1226</sup> It would be necessary for the OTP of the ACJHPR to consider a similar plan so as to fairly present cases of SGBV before the court. This form of strategic goal would assist the OTP of the ACJHPR to respond quickly to cases in which it should intervene. It would be an advantage for the OTP of the ACJHPR to ‘counter irregular growth and so provide financial predictability’<sup>1227</sup> in the light of the inevitable financial constraints it would face. The basic-size strategy would also provide the OTP of the ACJHPR with ‘stability in its resources and related planning’ and equip it ‘with an ability to respond more adequately and with the needed quality without having to over-prioritise or constantly overstretch existing resources’.<sup>1228</sup>

### **5.3.3 Jurisdiction of International Criminal Law Section of the African Court of Justice and Human and Peoples’ Rights**

Article 3 of the Malabo Protocol vests the ACJHPR ‘with an original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the

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<sup>1221</sup> ICC-OTP, Strategic Plan| 2016-2018 at 19. ICC, Policy Paper on Sexual and Gender-Based Crimes at 4 and Executive Summary para 2.

<sup>1222</sup> *Ibid.*

<sup>1223</sup> *Ibid.* ICC, Policy Paper on Sexual and Gender-Based Crimes at Executive Summary para 4.

<sup>1224</sup> *Ibid. Ibid.*

<sup>1225</sup> *Ibid. Ibid.*

<sup>1226</sup> *Idem* at 24.

<sup>1227</sup> *Ibid.*

<sup>1228</sup> *Ibid.*

provisions of the Statute annexed hereto'.<sup>1229</sup> The International Criminal Law Section of the ACJHPR would only have jurisdiction over crimes committed after its Protocol and Statute came into force;<sup>1230</sup> no prosecution of crimes committed before its Protocol and Statute came into force could be effected, thus creating an impunity gap in the prosecution of SGBCs, unless the ICC, which has been in force since 2002, or individual states at domestic level, try these cases<sup>1231</sup>. The AU Assembly of Heads of State and Government adopted the Malabo Protocol in June 2014, but since then no African state has ratified the Protocol. Reports from the AU Commission and AU Executive Council suggest the unlikelihood of the Malabo Protocol attaining the required ratifications in the near future, as ratification of treaties in Africa is historically a lengthy process. The AU Commission and AU Executive Council have repeatedly voiced their concern about the slow rate of ratification of OAU/AU treaties and the failure by member states to take the necessary steps to adopt them as part of their domestic law.<sup>1232</sup> The AU Executive Council has even gone as far as appealing to 'member states to ensure that they... initiate the process of ratification of new treaties within a period of one year after their adoption.'<sup>1233</sup> At its 30th Ordinary Session in January 2018, the Assembly of the African Union expressed its 'concern at the slow pace of ratification' of the Malabo Protocol, and endorsed the action plan for the Protocol's ratification.<sup>1234</sup> The Assembly in particular urged member states to ratify the Malabo Protocol. For their part legislators are reluctant to endorse the Malabo Protocol as it is 'unpalatable to nation states'<sup>1235</sup> in that the legislative power given by the Malabo Protocol to the Pan African Parliament, a consultative and advisory organ, to make laws for

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<sup>1229</sup> Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art 3(1).

<sup>1230</sup> *Idem* at art 11. Statute of the African Court of Justice and Human and Peoples' Rights, art 46E(1). In addition to this where a state became a party to the Protocol and Statute after its entry into force article 46E(2) of the Statute provides that 'the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Protocol and Statute for that State.' Fifteen member states need to ratify the Malabo Protocol for it to enter into force.

<sup>1231</sup> The exact date when the ICC entered into force was 1 July 2002, when its Statute entered into force. See Rome Statute, art 11.

<sup>1232</sup> Tiyanjana Maluwa 'Ratification of African Union treaties by member states: Law, policy and practice' (2012) 13 *Melbourne Journal of International Law* 1 at 4-5.

<sup>1233</sup> Decision on the Status of Signatures and Ratification of OAU/AU Treaties EX.CL/605(XVII), Ex.CL/Doc.571(XVII), adopted by the Seventeenth Ordinary Session of the Executive Council in Kampala, Uganda, on 25 July 2010.

<sup>1234</sup> African Union, Assembly, Thirtieth Ordinary Session, 'Decision on the International Criminal Court, Doc. EX.CL/1068 (XXXII)', 28-29 January 2018, Assembly/AU/Dec. 672(XXX), para 3(ii).

<sup>1235</sup> Pan African Parliament wants Malabo Protocol reviewed: available at <https://www.independent.co.ug> > AFRICA (accessed 10 May 2018).

Africa, is unacceptable to states.<sup>1236</sup> This reluctance places in jeopardy the prosecution of SGBCs in African armed conflicts, as states such as Burundi are in the process of leaving the ICC, and more African states may likely follow suit.<sup>1237</sup> Ideally the ACJHPR should be fully functional before these states pull out so that the ACJHPR is able to seamlessly take over the prosecution of SGBCs.<sup>1238</sup> However, the experience of the ICC shows it would take years before the ACJHPR would learn from mistakes made before it can secure successful prosecutions of SGBCs.

As with the ICC,<sup>1239</sup> the ACJHPR can exercise its jurisdiction based on territory or nationality. Thus, ACJHPR exercises jurisdiction where:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
- (b) The State of which the person accused of the crime is a national.<sup>1240</sup>

The statute of the ACJHPR goes further to state that the International Criminal Law Section of the ACJHPR can also exercise jurisdiction:

- (c) When the victim of the crime is a national of that State.
- (d) Extraterritorial acts by non-nationals, which threaten a vital interest of that State.<sup>1241</sup>

The ACJHPR can exercise its jurisdiction over crimes specified in Malabo Protocol when the prosecutorial powers are exercised *proprio motu* in cases when a state party refers a situation to the Prosecutor or the Assembly of Heads of State and Government of the AU or the Peace and Security Council of the African Union refers a situation to the Prosecutor.<sup>1242</sup> The drafters of the statute for the ACJHPR were careful not to include an organisation with powers similar to that of the Security Council that could refer situations to the OTP of the ACJHPR. Under the Rome

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<sup>1236</sup> *Ibid.*

<sup>1237</sup> States such as Botswana, Senegal, Nigeria and Ivory Coast are not in favour of withdrawing from the ICC. Yahoo News ‘Sudan’s al-Bashir, attending Rwanda summit, defies the ICC’, available at <https://news.yahoo.com/sudans-al-bashir-attending-rwanda-summit-defies-icc-183019> (accessed 18 July 2016). At the AU’s 28<sup>th</sup> summit, which took place in Addis Ababa, a resolution was passed for states to collectively withdraw from the ICC. As the resolution is non-binding on African states each state would individually decide if it wants to withdraw from the ICC. Human Rights Watch ‘AU’s ‘ICC Withdrawal Strategy’ Less than Meets the Eye’ available at <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye> (accessed 20 February 2017).

<sup>1238</sup> Article 127(1) of the Rome Statute provides that before a state party can withdraw from the Statute it must have given a written notification of its withdrawal addressed to the Secretary-General of the United Nations. ‘The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.’ Article 127(2) of the Rome Statute provides that states have a duty to cooperate with the ICC, until they are no longer a state party with the ICC.

<sup>1239</sup> Rome Statute, arts 12(2) and (3).

<sup>1240</sup> Statute of the African Court of Justice and Human and Peoples’ Rights, arts 46(2)(a) *E bis* and (b) *E bis*.

<sup>1241</sup> *Idem* art 46(2)(c) *E bis* and (d) *E bis*.

<sup>1242</sup> *Idem* art 46F.

Statute, ‘the Security Council acting under Chapter VII of the United Nations Charter of the United Nations’ may refer a situation to the ICC.<sup>1243</sup> The Security Council exercised its powers to refer the situation in Darfur, Sudan, to the ICC, by adopting Resolution 1593(2005).<sup>1244</sup> The Security Council’s referral of Darfur, a non-state party to the ICC, was based on the International Commission of Inquiries report ‘on the violations of international humanitarian and human rights violations in Darfur’.<sup>1245</sup> The enforcement of Resolution 1593(2005) by the ICC has been a cause of disagreement between the ICC and the AU, which has hindered the prosecution of SGBCs in Darfur. Although two African states, Benin and the United Republic of Tanzania, were in favour of the resolution’s adoption, the AU and scholars consider a Security Council’s referral of Darfur to the ICC as political.<sup>1246</sup> Three of the five permanent members of the Security Council are not parties to the ICC.<sup>1247</sup> Consequently, when the ICC initiates situations in this manner, it does not act judicially or as independently upon judicial interpretation of the law.<sup>1248</sup> In the referral of situations by the AU Assembly of the Heads of States and Governments, the 54 heads of state and governments will each have equal voting rights. In the case of the Peace and Security Council of the African Union referring a situation to the

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<sup>1243</sup> Under article 13(b) of the Rome Statute, the ICC may exercise its jurisdiction where ‘(a) situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.’ The other two methods by which the ICC may have jurisdiction over an individual who belongs to a non-member state are contained in article 12(3).

<sup>1244</sup> Resolution 1593(2005), adopted by the Security Council at its 5158<sup>th</sup> meeting, on 31 March 2005. This resolution was adopted by a vote of 11 in favour, to none against, with four abstentions from Algeria, Brazil, China and the United States. United Nations ‘Security Council refers situation in Darfur, Sudan to Prosecutor of the International Criminal Court’, available at [www.un.org/press/en/2005/sc8351.doc.htm](http://www.un.org/press/en/2005/sc8351.doc.htm) (accessed 25 May 2016). The United Nations and most countries in Europe and Human Rights Watch were in favour of a referral. The US initially objected to the referral as it did not recognise the ICC, and was afraid that it would put its citizens at risk of being prosecuted for international crimes committed at Darfur. It was in favour of the creation of a special court for Darfur. *BBC* ‘UN urges Darfur war crimes trials’, available at [www.democraticunderground.com > Discuss > TopicForums > NationalSecurity](http://www.democraticunderground.com > Discuss > TopicForums > NationalSecurity) (accessed 25 May 2016).

<sup>1245</sup> Resolution 1593(2005).

<sup>1246</sup> Paola Gaeta ‘Guest Post: The ICC changes its mind on the immunity from arrest of President Al Bashir, but it is wrong again’ available at <https://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-w> (accessed 12 July 2016). Nsongurua J Udombana ‘Can these dry bones live? In search of a lasting therapy for AU and ICC toxic relationship’ (2014) *African Journal of International Criminal Justice* 57 at 74. Kaba, the President of the Assembly of State Parties to the ICC suggests that the right to veto by the five permanent members of the SC should not be absolute. With regard to mass crimes, this right should have no standing; otherwise, it would create ‘a sense of injustice, a sense of a two-tier justice system to the benefit of big countries or selective justice to the detriment of small countries.’ Press conference by the President of the Assembly of States Parties, H. E. Mr Sidiki Kaba on the withdrawal from the Rome Statute at 9 (24 October 2016) available at [https://asp.icc-cpi.int/iccdocs/.../PASP-PressConference\(24Oct2016\)-ENG-transcript.p](https://asp.icc-cpi.int/iccdocs/.../PASP-PressConference(24Oct2016)-ENG-transcript.p) (accessed 14 February 2017)

<sup>1247</sup> The three non-ICC state members are the United States of America, China and Russia.

<sup>1248</sup> Gaeta ‘Guest Post.’ Udombana ‘Can these dry bones live?’ at 74.



Prosecutor, the 15 members reflect a regional balance, with each region's vote being equal.<sup>1249</sup> In addition to this, none of the members sits permanently, but is subject to re-election.<sup>1250</sup>

### 5.3.4 The controversial immunity clause

#### 5.3.4(i) Article 46A bis and immunity

The provision for the immunity of heads of states and other senior state officials in article 46A bis in the Malabo Protocol has been described as 'the most controversial aspect of the Malabo Protocol',<sup>1251</sup> 'short-sighted and shameful and probably serving as little more than a symbolic fist shake in the face of the ICC'.<sup>1252</sup> Article 46A bis provides that:

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, anybody acting or entitled to act in such capacity, or any other senior state officials based on their functions during the tenure of office.

This granted blanket immunity to certain officials. The AU views this article as consistent with and reflective of customary international law.<sup>1253</sup> To buttress this point, Tladi refers to a press release in which the AU Commission stated that 'the immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals'.<sup>1254</sup> The commission went on to state that states could not, therefore, 'contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal'.<sup>1255</sup> Tladi notes that the text of article 46A bis, is ambiguous and poorly drafted. His first comment on the text, relates to the phrase 'or anybody. . . entitled to act in such capacity', which he states is unclear and capable of a broad interpretation.<sup>1256</sup> For example, it could include all ministers and also all members of parliament of certain states.<sup>1257</sup> In addition to Tladi's

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<sup>1249</sup>Peace and Security Council – Wikipedia available at

[https://en.wikipedia.org/wiki/Peace\\_and\\_Security\\_Council](https://en.wikipedia.org/wiki/Peace_and_Security_Council) (accessed 16 February 2017).

<sup>1250</sup> Five of these members are elected to a three-year term, whilst 10 of them are elected to a two-year term.

<sup>1251</sup> Amnesty International 'Malabo Protocol' at 16.

<sup>1252</sup> Max du Plessis, 'Shambolic, shameful and symbolic: Implications of the African Unions immunity for African leaders' (2014) 278 *Institute for Security Studies* 1 at 2.

<sup>1253</sup> Dire Tladi 'The immunity provision in the AU amendment protocol and the entrenchment of the hero-villain trend' (2015) 13 *Journal of International Criminal Justice* 1, 9, available at SSRN

<https://ssrn.com/abstract=2628137> or <http://dx.doi.org/10.2139/ssrn.2628137> (accessed 14 April 2018).

<sup>1254</sup> *Idem* at 8. See AU Commission Press Release 002/2012 on the Decisions of Pre-Trial Chamber of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Al-Bashir of the Republic of the Sudan, 9 January 2012, p 2.

<sup>1255</sup> *Ibid. Ibid.*

<sup>1256</sup> *Idem* at 3.

<sup>1257</sup> *Ibid.*

comment, article 46A bis does not specify which senior state officials, are entitled to immunity. The deliberations on the amendments finalising the draft Malabo Protocol concluded that senior state officials ‘would be determined by the court, on a case-by-case basis taking their functions into account in accordance with international law’.<sup>1258</sup> The law demands clarity on the important issue of which officers are entitled to immunity under customary international law. Tladi’s second criticism relates to whether article 46A bis creates two regimes of immunity or just one.<sup>1259</sup> International customary law differentiates between two types of immunity – immunity *ratione personae* and immunity *ratione materiae*. Distinguishing between the two is relevant as they apply to different state officials and have different legal implications. With regard to immunity *ratione personae* (personal immunity), ‘holders of high-ranking office in a state, such as heads of state, heads of government, and ministers of foreign affairs enjoy immunity from the jurisdiction in other states’.<sup>1260</sup> This type of immunity is inviolable. Diplomats and officials sent on special missions abroad also enjoy immunity *ratione personae*<sup>1261</sup> to protect them against any act of national authorities before national courts which would hinder them from engaging in their international duties.<sup>1262</sup> As states are equal and sovereign, there is a horizontal interstate relationship between them.<sup>1263</sup> Immunity *ratione personae* protects these officials in respect of official and private acts carried out by them prior to taking office or while in office.<sup>1264</sup> The

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<sup>1258</sup> Executive Council Twenty-Fifty Ordinary Session, 20 -24 June 2014, Malabo, Equatorial Guinea, EX.CL/846(XXV), The Report, The Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, Consideration of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, para 26.

<sup>1259</sup> Dire Tladi ‘The immunity provision in the AU amendment protocol’ at 3

<sup>1260</sup> ICJ ‘Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*)’, Merits Judgment of 14 February 2002, [2002] ICJ Reports 3, para 51. (Arrest Warrant). Most scholars refer to the *Arrest Warrant case* when referring to which government officials are entitled to claim this type of immunity. In the *Arrest Warrant case* heads of government are mentioned as persons covered by immunity *ratione personae*, yet in the *Pinochet case* Lord Millett stated that this type of immunity ‘was not available to serving heads of government who are not also Heads of State ...’. Thus, as the *Arrest Warrant case* specifies, heads of state and heads of government, a head of government does not necessarily have to be a head of state. House of Lords, *Bartle and the Commissioner of Police for the metropolis and others, ex parte Pinochet; R v Evans and another the Commissioner of Police for the metropolis and others, ex parte Pinochet, R v* [1999] UKHL 17 (24 March 1999).

<sup>1261</sup> *Ibid.*

<sup>1262</sup> *Idem* para 54. *Prosecutor v Omar Hassan Ahmad Al Bashir* ‘Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir’ ICC-02/05-01/09-139 (12 December 2011) para 34.

<sup>1263</sup> Dapo Akande ‘International law immunities and the International Criminal Court’ (2004) 98 *The American Journal of International Law* 407 at 415.

<sup>1264</sup> Antonio Cassese ‘When may senior state officials be tried for international crimes? Some comments on the Congo v Belgium case’ (2002) 13 *EJIL* 853 at 864. Dapo Akande ‘International law immunities and the International Criminal Court’ at 410.

immunity however, ceases to exist when they leave office, thus leaving them open to prosecution for acts which they committed in their private capacity.<sup>1265</sup> Immunity *ratione materiae* (functional immunity) on the other hand, relates to official acts carried out by an individual acting on behalf of the state.<sup>1266</sup> It protects a wider category of state officials who can claim this type of immunity compared to those protected under immunity *ratione personae*. Immunity *ratione materiae* protects previous and current state officials, officials who are no longer state officials but have previously represented the state, and non-state organisations which have acted on the state's behalf.<sup>1267</sup> This immunity is a substantive defence compared to immunity *ratione personae*, which is a procedural defence.<sup>1268</sup> In this regard, state officials claim immunity *ratione materiae* on the basis that other states should not prosecute them, for official acts carried out on behalf of their state, as these are acts of the state.<sup>1269</sup> Thus, state officials continue to enjoy this immunity even when they no longer carry out their official function.<sup>1270</sup> However, state officials cannot plead immunity *ratione materiae* when charged with an international crime.<sup>1271</sup>

The International Court of Justice (ICJ) in the *Arrest Warrant* case concluded, after examining state practice, national legislation and national higher courts decisions that no exception to immunity *ratione personae* existed before national courts of a foreign state, where an incumbent Minister of Foreign Affairs is accused of committing international crimes.<sup>1272</sup> Although the ICJ case concerned an incumbent Minister of Foreign Affairs, scholars and judges recognise the ratio as applying also to heads of states and government, and state officials who are entitled to immunity.<sup>1273</sup> The ICJ also considered immunity provisions of international criminal

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<sup>1265</sup> *Ibid. Ibid.*

<sup>1266</sup> *Idem* at 862. *Idem* at 412.

<sup>1267</sup> Dapo Akande 'International law immunities and the International Criminal Court' at 413.

<sup>1268</sup> Antonio Cassese 'When may senior state officials be tried for international crimes?' at 863.

<sup>1269</sup> *Idem* at 863. Dapo Akande 'International law immunities and the International Criminal Court' at 413.

<sup>1270</sup> *Ibid.*

<sup>1271</sup> Dapo Akande 'International law immunities and the International Criminal Court' at 413.

<sup>1272</sup> ICJ 'Case concerning the Arrest Warrant of 11 April 2000' para 58.

<sup>1273</sup> See for example ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 4 June 2008, para. 170 (where the ICJ affirmed its findings) See also PTC II, ICC, Situation in Darfur, Sudan, In the case of the *Prosecutor v Omar Hassan Ahmad Al-Bashir* 'Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir' (6 July 2017) para 68 (where the Chamber deduced that it could not identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another state, even when the arrest is sought on behalf of an international court.' National courts have applied this principle, for example, with regard to Zimbabwe's former president Robert Mugabe and Margaret Thatcher when she was Britain's prime minister. See Dapo Akande 'International law immunities and the International Criminal Court' at 411 (for more examples of national courts which recognized the international customary law on immunities for

tribunals and held that none of these provisions enabled ‘it to conclude that any such an exception exists in customary international law in regard to national courts’.<sup>1274</sup> The ICJ, however, stated that there are certain circumstances when immunities enjoyed by state officials under international criminal law would not represent a bar to criminal prosecution.<sup>1275</sup> One of such circumstances mentioned by the ICJ is when the state official (in this case an incumbent or former Minister of Foreign Affairs) ‘may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction’.<sup>1276</sup> The Malabo Protocol provides that ACJHPR does not have jurisdiction over these officials. Furthermore, there is no provision in the Malabo Protocol removing the customary international law immunity of these officials belonging to state parties to the Malabo Protocol. Consequently, a state party to the Malabo Protocol will be in breach of its obligations under international law for arresting and surrendering (under an ACJHPR-issued arrest warrant) such officials who are on their territory and who belong to state parties to the Malabo Protocol, or non-state parties, which accept the court’s jurisdiction,. This is likely to hinder the prosecution of SGBCs committed in armed conflicts, and other crimes committed within the jurisdiction of the ACJHPR when these are perpetrated by individuals who enjoy immunity.<sup>1277</sup> This is of particular concern, given the trend for African heads of states to remain in power for years and show a reluctance to step down,<sup>1278</sup> coupled with tendency of African states to shield their senior state officials from prosecution.

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sitting heads of state). Paola Gaeta ‘Does President Al-Bashir enjoy immunity from arrest?’ (2009) 7 *Journal of International Criminal Justice* at 315 at 320.

<sup>1274</sup> ICJ ‘Case concerning the Arrest Warrant of 11 April 2000’ para 58.

<sup>1275</sup> *Idem* para 61.

<sup>1276</sup> *Ibid.*

<sup>1277</sup> In Sirleaf’s view the inclusion of the immunity clause in the Statute of the ACJHPR may be of an advantage as it could work to ‘encourage state cooperation with the regional criminal court, because leaders will not have to fear that the court will be used as a tool by more powerful states for regime change.’ Matiangai V S Sirleaf ‘Regionalism, regime complexes and the crisis in international criminal justice’ (2016) 54 *Columbia Journal of Transnational Law* 699 at 756.

<sup>1278</sup> An example was the case of Chad’s former head of state, Hissene Habre, convicted of crimes against humanity of rape, sexual slavery and ordering the killing of 40,000 people, which were committed from 1982 to 1990 when he was head of state. Bringing Habre to trial was a long process. Though Habre was overthrown in 1990, he was tried on 20 July 2015. His trial ended on 11 February 2016. An Extraordinary African Chamber in Senegal, which Senegal and the AU inaugurated in February 2013, convicted him on 30 May 2016. Human Rights Watch ‘Q&A: The case of Hissene Habre before the Extraordinary African Chambers in Senegal’ available at <https://www.hrw.org/.../qa-case-hissene-habre-extraordinary-african-chambers-senega>. (accessed 14 February 2016). BBC news ‘Hissene Habre: Chad’s ex-ruler convicted of crimes against humanity’ available at [www.bbc.com/news/world-africa-36411466](http://www.bbc.com/news/world-africa-36411466) (accessed 14 February 2016).

Al-Bashir, is a case in point, having ruled Sudan since 1989.<sup>1279</sup> Even as the ICC seeks his arrest and surrender for crimes which include rape and torture, Al-Bashir is unlikely to give up power. Some international criminal courts, which the ICJ mentioned as having jurisdiction over incumbent or former state officials, included the ICTY, ICTR, and the International Criminal Court (ICC).<sup>1280</sup> To qualify as an international criminal court, Gaeta argues that under international law the court ought to possess a personality, which is distinct from a state or group of states.<sup>1281</sup> Akande also argues that the inherent features of the tribunal are important, that is, how the tribunal was established and if the constitutive instrument binds the state of the official whom the court wishes to try.<sup>1282</sup> In this regard, the constitutive instrument, which establishes the international tribunal or court, must provide for the exclusion of immunity.<sup>1283</sup> The Charter of the International Military Tribunal for Nuremberg, for instance, and the Charter of the International Military Tribunal for the Far East provided for the criminal prosecution of individuals for international crimes regardless of their official status.<sup>1284</sup> Whilst the tribunal at Nuremberg was established to try major war criminals of the European Axis, the Far East tribunal was established to try Japanese top military, political and diplomatic leaders.<sup>1285</sup> Article 7 of the Charter of the International Military Tribunal (Nuremberg) provides that:

The official position of defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.<sup>1286</sup>

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<sup>1279</sup> Examples of other presidents who have held on to power for a long time are, Teodoro Obiang Nguema of Equatorial Guinea who has been president since 1982. Jose Eduardo dos Santo of Angola who was been President 1979-1918. Robert Mugabe of Zimbabwe who had been President since 1987. He finally gave up power in 2017. Yoweri Museveni of Uganda who has been President since 1986. Daily Monitor 'Africa's longest serving leaders', available at [www.monitor.co.ug](http://www.monitor.co.ug) > Home > News > World (accessed 18 July 2016).

<sup>1280</sup> ICJ 'Case concerning the Arrest Warrant of 11 April 2000' para 61.

<sup>1281</sup> Paola Gaeta 'Does President Al-Bashir enjoy immunity from arrest?' at 322.

<sup>1282</sup> Dapo Akande 'International law immunities and the International Criminal Court' at 417.

<sup>1283</sup> *Ibid.*

<sup>1284</sup> Agreement for the prosecution and punishment of the major war criminals of the European Axis, ("London Agreement"), (8 August 1945) 82 UNTS 280. Charter of the International Military Tribunal for the Far East, Dated at Tokyo January 19, 1946, amended April 26, 1946, TIAS 1589: 4 Bevans 20, art 6. Reference should be made to Chapter 2 for a more detailed explanation of these tribunals in relation to SGBCs.

<sup>1285</sup> See Chapter 2 on the IMT at Nuremberg and the IMT for the Far East. See Paola Gaeta 'Does President Al-Bashir enjoy immunity from arrest?' at 322 (where Gaeta questions whether the IMT at Nuremberg is an international criminal court.)

<sup>1286</sup> Agreement for the prosecution and punishment of the major war criminals of the European Axis, ("London Agreement"), (8 August 1945) 82 UNTS 280, art 7. (This rule was later endorsed in the Judgment of the Tribunal in October 1946, by the United Nations General Assembly in Resolution 95(1) in 1950 and also by the International Law Commission as Principle III in the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal).

Article 6 of the Charter of the International Military Tribunal for the Far East states that:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.<sup>1287</sup>

The two *ad hoc* Tribunals which were established pursuant to UNSC resolutions under powers exercised under Chapter VII of the UN Charter, contained similar provisions in their Statutes. Members of the UN are taken to have agreed to waive their immunity before these two *ad hoc* Tribunals as they are bound by decisions of the Security Council by virtue of article 25 of the UN Charter.<sup>1288</sup> Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) provides that:

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.<sup>1289</sup>

The International Criminal Tribunal for Rwanda (ICTR) contains a similar provision in article 6(2) of its Statute.<sup>1290</sup> The Appeals Chamber of the Special Court for Sierra Leone also recognised this principle, after concluding that the Special Court for Sierra Leone was an international court.<sup>1291</sup> Article 6(2) of the Statute of the Special Court for Sierra Leone, which provides a similar provision to that of the Statutes of the ICTY and ICTR states that:

The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.<sup>1292</sup>

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<sup>1287</sup> Charter of the International Military Tribunal for the Far East, Dated at Tokyo January 19, 1946, amended April 26, 1946, TIAS 1589: 4 Bevans 20, art 6.

<sup>1288</sup> See article 25, United Nations Charter which provides that [t]he Member of the United Nations have agreed to accept and carry out the decisions of the Security Council in accordance with the present Charter. Dapo Akande 'International law immunities and the International Criminal Court' at 417. Paola Gaeta 'Does President Al-Bashir enjoy immunity from arrest?' at 330 (stating that both *ad hoc* tribunals 'are subsidiary organs of the Security Council and constitute in and of themselves a measure to restore peace and security under Chapter VII of the UN Charter . . . [T]he decisions taken by ICTY or ICTR on judicial cooperation are decisions which derive their binding force directly from a decision of the Security Council under Chapter VII (and therefore prevail over any other international obligation of a UN member state under Article 103 of the UN Charter) . . .')

<sup>1289</sup> Statute of the International Tribunal for the former Yugoslavia, SC res 827, U.N. SCOR, 48<sup>th</sup> Sess., 3217<sup>th</sup> mtg., at 1-2 (1993), 32 ILM 1159 (1993), art 7(2). See Chapter 2 which discusses the ICTY in relation to SGBCs.

<sup>1290</sup> Statute of the International Tribunal for Rwanda, SC res 995, U.N. SCOR, 49<sup>th</sup> Sess., 3453 mtg., U.N. Doc S/RES/955 (1994); 33 ILM 1598 (1994), art 6(2). See Chapter 2 which discusses the ICTR in relation to SGBCs).

<sup>1291</sup> Appeals Chamber, *Prosecutor v. Charles Ghankay Taylor* 'Decision on Immunity from Jurisdiction' SCSL-2003-01-I (31 May 2004) paras 37 -42.

<sup>1292</sup> Statute of the Special Court for Sierra Leone, art 6(2), 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246, appendix II

In applying article 6(2) of the Statute, the Appeals Chamber held that ‘the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court. . . . [It] finds that Article 6(2) of the Statute is not in conflict with any peremptory norm of general international law and its provisions must be given effect by this court’.<sup>1293</sup> Thus whilst previous international tribunals provided for the prosecution of incumbent heads of state and their officials, the Malabo Protocol grants them immunity. It is thus pertinent to consider the prosecution of such persons for SGBCs before the ICC.

#### **5.3.4 (ii) The ICC as an alternative court from the ACJHPR to prosecute those entitled to immunity under customary international law**

The Malabo Protocol permits the prosecution of persons who are not immune to prosecution under customary international law.<sup>1294</sup> Thus, the ACJHPR will have jurisdiction to prosecute such persons as rebel fighters, persons in opposition to the government, and individuals who are

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<sup>1293</sup> Appeals Chamber *Prosecutor v. Charles Ghankay Taylor* ‘Decision on Immunity from Jurisdiction’ paras 52-53.

<sup>1294</sup> Some African states’ Constitutions grant immunity to their head of state and vice-president. Even though those states may be able to try genocide, crimes against humanity and war crimes, if their Constitution is not amended, their head of state and vice-president will be immune from domestic prosecution while they hold office. This means that the same principle, which applies to shielding heads of state and senior officials whilst in power at the regional level, will apply at the domestic level in those states.

Section 308 of the Nigerian Constitution, for example, provides that:

- (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section
- (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
- (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
- (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be issued
- (2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party
- (3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy; and the reference in this section to “period of office” is reference to the period during which the person holding such office is required to perform the functions of the office.

However, the Bill implementing the Rome Statute in Nigeria grants the President, Vice-President, Governor or Deputy Immunity, and thus contravenes article 27 of the Rome Statute. Section 20(1) of the Bill provides that: Subject to the provisions of section 308 of the Constitution, a state or diplomatic immunity attaching to a person or premises by reason of a connection with a state party of the Rome Statute shall not prevent proceedings under this Act, in relation to that person or premises. See Constitution of the Federal Republic of Nigeria, 1999 as amended, section 308. Crimes against humanity, war crimes, genocide and related offences Bill, 2012 available at [www.pgaction.org/.../CRIMES-AGAINST-HUMANITY-WAR-CRIMES-GENOCIDE](http://www.pgaction.org/.../CRIMES-AGAINST-HUMANITY-WAR-CRIMES-GENOCIDE) (accessed 14 February 2017).

not state officials at the time. The head of state, government officials or state officers, who enjoy immunity while in office could face prosecution when their immunity lapses. It is thus worth considering the ICC as an alternative court to prosecute these officials whilst they are still in office. This, however, would only be possible in the event of a state being unwilling or unable to try crimes within the ICC's jurisdiction, as the ICC is a court of last resort.<sup>1295</sup> The issue of immunity before the ICC has been a hurdle for the prosecution of perpetrators of SGBCs before the court as the ICC relies on member states' cooperation to arrest and surrender perpetrators of SGBCs, and without which it cannot fulfil its mandate.<sup>1296</sup> The failure of the ICC to prosecute these crimes is plain to see where states such as Malawi, Chad, the DRC, South Africa, the Hashemite Kingdom of Jordan and Kenya have refused to cooperate with its request for the arrest and surrender of Al-Bashir when he visited their states. The question whether such states have an obligation to arrest and surrender a person entitled to customary international law immunity, has hinged on the interpretation of article 27(2) of the Rome Statute, and its relationship to article 98(1) of the Rome Statute. This has proved particularly contentious when non-states parties to the Rome Statute, which have not accepted the ICC's jurisdiction, have been petitioned to hand over an individual who enjoys immunity for prosecution. This has led to considerable debate amongst scholars,<sup>1297</sup> in the AU and the ICC. The AU's position is that 'states cannot contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal'.<sup>1298</sup> The AU maintains that 'a treaty only binds parties to

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<sup>1295</sup> Rome Statute, art 17. See Chapter 3.

<sup>1296</sup> Part 9 of the Rome Statute titled 'International cooperation and judicial assistance,' contains 16 articles which address various issues relating to cooperation. Article 86, for example, provides that 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.' Article 87 provides for the general provisions relating to requests for cooperation, article 88 for the availability of procedures under national law, article 89 for the surrender of persons to the court, article 90 for competing requests and article 91 for contents of request for arrest and surrender.

<sup>1297</sup> For discussions on whether non-state parties are stripped of their international customary law immunity under articles 27 and 98 of the Rome Statute, when the UNSC makes an article 13(b) referral to the ICC, see articles by Paola Gaeta and Dapo Akande, two of the leading authorities on this topic. Paola Gaeta 'Does President Al-Bashir enjoy immunity from arrest?' at 315- 332. Dapo Akande 'International law immunities and the International Criminal Court' at 407-433. Dapo Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* at 333-352. Dapo Akande 'The Bashir indictment: Are serving heads of state immune from ICC prosecution' (2008) available at <http://www.law.ox.ac.uk/sites/files/oxlaw/akandel.pdf> (accessed 25 May 2016). Dov Jacobs 'The ICC and immunities, Round 326: ICC finds that South Africa had an obligation to arrest Bashir but no referral to the UNSC' available at <https://dovjacobs.com/2017/07/06/the-icc-and-immunities-round-326-icc-finds-that-south-africa-had-an-obligation-to-arrest-bashir-but-no-referral-to-the-uns/> (accessed 10 May 2018).

<sup>1298</sup> See AU Commission Press Release 002/2012 on the Decisions of Pre-Trial Chamber of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad



the treaty'.<sup>1299</sup> Moreover, 'a treaty may not deprive non-party states of rights which they ordinarily possess'.<sup>1300</sup> AU member states, both non-states parties and states parties to the ICC, have preferred to 'comply with the decisions and policies of the Union'<sup>1301</sup> according to its Constitutive Act. They have done this by aligning with the AU's directive not to cooperate with the ICC, 'pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunity for the arrest and surrender of President Omar El Bashir of The Sudan'.<sup>1302</sup>

The ICC's decision on South Africa's failure to cooperate with it in the arrest and surrender of Al-Bashir gives it latest exposition of the application of articles 27(2) and 98(1) of the Rome Statute,<sup>1303</sup> which its prior decisions in relation to Malawi and Chad failed to address. The ICC's decisions on Malawi and Chad's failure to cooperate with the Pre-Trial Chamber's request for the arrest and surrender of Al-Bashir reflected the tension which exists between articles 27(2) and 98(1) of the Rome Statute.<sup>1304</sup> In these decisions, the court, however, concluded that both states had 'failed to comply with the cooperation requests contrary to the provisions of the Statute' and thus 'prevented the Court from exercising its functions and powers under the Statute'.<sup>1305</sup> The ICC found in the Malawi decision that:

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and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Al Bashir of the Republic of the Sudan, 9 January 2012, p 2.

<sup>1299</sup> *Ibid.*

<sup>1300</sup> *Ibid.*

<sup>1301</sup> *Idem* at p 1. Article 23 (2) of the Constitutive Act of the African Union.

<sup>1302</sup> African Union, Assembly, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(XIII)', 3 July 2009, para 10. African Union, Assembly, Assembly, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court - Doc. EX.CL/670(XIX)', 30 June-1 July 2011, Assembly/AU/Dec.366(XVII), para 6.

<sup>1303</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* 'Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa' African Union, Assembly, Thirtieth Ordinary Session, 'Decision on the International Criminal Court, Doc. EX.CL/1068 (XXXII)', 28-29 January 2018, Assembly/AU/Dec.672(XXX), para 2(iii).

<sup>1304</sup> In the Malawi decision, which the PTC also referred to in the Chad decision, the ICC stated that it noted 'that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the AU, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.' *Prosecutor v Omar Hassan Ahmad Al Bashir* 'Corrigendum to the Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmed Al Bashir' ICC-02/05-01/09 (13 December 2011) para 37. *Prosecutor v Omar Hassan Ahmad Al Bashir* 'Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmed Al Bashir' ICC-02/05-01/09 (13 December 2011) para 13.

<sup>1305</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* 'Corrigendum to the Decision pursuant to Article 87(7) of the Rome Statute' *Prosecutor v Omar Hassan Ahmad Al Bashir* 'Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad'.

Customary international law creates an exception to Head of State immunity when international courts seek a Head of States arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.<sup>1306</sup>

The Pre-Trial Chamber reached a similar decision in the case against Chad.<sup>1307</sup>

The ICC's decision relating to the DRC's failure to cooperate with the Court for the arrest and surrender of Al-Bashir, gave its own interpretation on articles 27(2) and 98(1) of the Rome Statute in regard to the immunity of a non-state party, (in this case Sudan), which has not accepted the ICC's jurisdiction. The ICC interpreted article 27(2) of the Rome Statute, which provides that '[i]mmunities or special procedural rules, which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person' as an 'exception to the Court's jurisdiction' and stated that it 'should in principle, be confined to those State Parties who have accepted it.'<sup>1308</sup> The ICC held that article 98(1), which provides that

[t]he court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity,

referred to the 'cooperation of the third [party] state for the waiver or lifting the immunity of its Head of State'.<sup>1309</sup> Consequently, unless the non-state party waives the immunity of its persons, the ICC cannot request the surrender or assistance from a state of such persons. It also stated that the article aimed 'at preventing the requested State from acting inconsistently with its international obligations towards the non-State Party with respect to the immunities attached to the latter's Head of State'.<sup>1310</sup> The ICC, however, concluded that article 98(1) did not apply in this case to a non-State party to the Rome Statute, that is, Sudan. It based its decision on paragraph 2 of Resolution 1593(2005), which the ICC stated 'implicitly waived the immunities

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<sup>1306</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* 'Corrigendum to the Decision pursuant to Article 87(7) of the Rome Statute' para 43.

<sup>1307</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* 'Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad'.

<sup>1308</sup> *Ibid.*

<sup>1309</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* 'Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court' ICC-02/05-01/09 (9 April 2014) para 27.

<sup>1310</sup> *Ibid.*

granted to Omar Al Bashir under international law and attached to his position as a Head of State’,<sup>1311</sup> thus reversing its earlier decisions in the Malawi and Chad cases.

The ICC’s recent decision on South Africa’s non-cooperation, found that South Africa’ failed to cooperate with the court by not arresting and surrendering Al-Bashir when he visited South Africa.<sup>1312</sup> Although the Pre-Trial judges agreed on this point, Judge Marc Perrin de Brichambant disagreed with the majority’s decision regarding the legal basis upon which Al-Bashir could not claim customary international law immunity.<sup>1313</sup> The majority judges considered whether any derogation from immunity under customary international law existed when the ICC sought the arrest and surrender of a head of state who was entitled to immunity in the context of the relationship between articles 27(2) and 98(1) of the Rome Statute. The Chamber held that article 27(2) excluded heads of state claiming immunity from arrest<sup>1314</sup> and referred to the existence of a vertical and horizontal relationship under article 27(2). Since a vertical relationship existed between the ICC and a state party; a person belonging to that state party could not claim immunity, including a head of state from that state party. As a result, a state party cannot refuse the court’s request for the arrest and surrender of that concerned person. Ratifying the Rome Statute, in their view, meant that state parties ‘accepted the irrelevance of immunities based on official capacity, including those that they may otherwise possess under international law’.<sup>1315</sup> The same applied at the horizontal level where an inter-state relationship existed between states parties to the Rome Statute. Thus, a states party had a duty, to comply with a request from the ICC for the arrest and surrender of a head of state from another state party. The rationale behind this was that states parties had waived their right to claim immunity by voluntarily ratifying the Rome Statute.<sup>1316</sup> As a result, the ICC held that article 98(1) of the Rome Statute did not apply to states parties to the Rome Statute and states that had accepted the

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<sup>1311</sup> *Idem* para 29.

<sup>1312</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* ‘Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa’. *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09, 6 July 2017, para 1.

<sup>1313</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* ‘Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa’ minority Opinion of Judge Marc Perrin De Brichambaut, para 1.

<sup>1314</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* ‘Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa’ para 74.

<sup>1315</sup> *Idem* para 76 – 78.

<sup>1316</sup> *Idem* paras 76, 79-80.

court's jurisdiction under article 12(3) of the Rome Statute.<sup>1317</sup> The ICC also recognised that in principle, non-state parties to the Rome Statute did not have an obligation to cooperate with the ICC; neither, were their immunity rights under international law affected by article 27(2) of the Rome Statute.<sup>1318</sup> With regard to article 98(1) of the Rome Statute, the ICC held that it could not request a state party to arrest and surrender a head of state or state official who belonged to a non-state party, unless it had obtained a waiver of immunity from the relevant non-state party.<sup>1319</sup> The ICC pointed out that 'article 98 of the Statute addresses the Court, and is not a source of substantive rights (or additional duties) to state parties'.<sup>1320</sup> Thus, article 98 does not provide state parties the right to refuse to comply with the ICC's requests for cooperation or postpone carrying out its arrest and surrender request.<sup>1321</sup> This applies even when the request for arrest and surrender applies to a person who enjoys diplomatic immunity or customary international law immunity.<sup>1322</sup>

The ICC also held that when the Security Council refers a situation to the ICC in terms of article 13(b) of the Rome Statute under Chapter VII of the UN Charter, a state that has not accepted the Rome Statute may be bound by the obligations defined in it.<sup>1323</sup> In considering such a situation, the ICC considered SC Resolution 1593 (2005), where the SC, in acting under Chapter VII of the UN Charter, referred the Darfur situation to the ICC. In line with its previous decisions, the ICC held that the effect of such a referral in triggering the court's jurisdiction meant that the entire Rome Statute's legal framework applied.<sup>1324</sup> Apart from this, Resolution 1593 (2005) also placed an obligation on Sudan to cooperate fully with the ICC and provide the ICC with the required assistance.<sup>1325</sup> Thus, Sudan's rights and obligations in this situation became analogous with those states that had ratified the Rome Statute.<sup>1326</sup> As a result, article 27(2) of the Statute applied in the same way to Sudan as it did to states parties to the Rome Statute, which meant that Al-Bashir could not claim customary international law immunity based on his official capacity as head of state. Sudan, therefore, had the obligation to arrest and

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<sup>1317</sup> *Idem* para 82.

<sup>1318</sup> *Ibid.*

<sup>1319</sup> *Ibid.*

<sup>1320</sup> *Idem* para 100.

<sup>1321</sup> *Idem* paras 99 and 104.

<sup>1322</sup> *Idem* para 102.

<sup>1323</sup> *Idem* para 83.

<sup>1324</sup> *Idem* para 85.

<sup>1325</sup> *Idem* para 87.

<sup>1326</sup> *Idem* para 88.

surrender Al-Bashir to the ICC as he was not immune from the ICC's jurisdiction.<sup>1327</sup> Furthermore, as article 98(1) did not apply in this situation, it was not necessary to obtain a waiver of Al-Bashir's immunity, as 'a waiver can be conceived of only where immunity applies'.<sup>1328</sup> Thus, state parties would not violate their obligation under international law regarding immunity by arresting Al-Bashir and surrendering him to the ICC.<sup>1329</sup>

Although the AU had boldly included article 46 bis in the statute of the ACJHPR, the ICC indirectly granted heads of state and senior official's immunity when it accepted referrals of situations from the presidents of the DRC and Uganda.<sup>1330</sup> In deciding to accept these referrals to prosecute SGBCs, it was clear that the governments of the DRC and Uganda had no intention to prosecute those who also committed these crimes, especially if the ICC needed those governments' cooperation to investigate such crimes in their country.<sup>1331</sup>

Rather than having a blanket provision granting immunity to African heads of states and their senior state officials, the AU should consider adding a proviso that in the event of peace talks failing or are being unlikely to succeed, heads of states and their senior state officials could be prosecuted when in power. In addition, a proviso should be considered that in the event of any successful peace talks, the OTP of the ACJHPR, would not be prevented from prosecuting heads of states or their senior state officials when they cease to hold such positions. Alternatively states could enter a reservation, that this article would not be applicable to them. This at least would give hope to victims of SGBV rather than having to run up against a blanket immunity in the Malabo Protocol. Alternatively, the AU could have a provision similar to that of article 16 of the Rome Statute, where situations deferred for a certain number of months in the interest of peace and security<sup>1332</sup> could carry a proviso that this would not prevent the prosecution of heads of states or their senior officials.

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<sup>1327</sup> *Idem* paras 91 – 92.

<sup>1328</sup> *Idem* para 96.

<sup>1329</sup> *Idem* para 93.

<sup>1330</sup> See for example William W Burke-White 'Complementarity in practice: the International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* at 557-590 (explaining how President Kabila, President of the DRC used the ICC for his own legal and political interests. The ICC without accepting the referral would have been left without prosecuting any of the perpetrators of SGBCs).

<sup>1331</sup> *Ibid.*

<sup>1332</sup> Rome Statute, art 16 which provides: '[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be

The controversy regarding article 46A bis is reminiscent of the bilateral immunity agreements (BIAs) signed between the United States and other states. The United States has signed BIAs with states which provide ‘that current or former US government officials, military and other personnel regardless of whether or not they are nationals of the state concerned, that is, foreign sub-contractors working for the US and US nationals, would not be transferred to the jurisdiction of the ICC.’<sup>1333</sup> Such BIAs defy state parties’ obligation towards the ICC as they grant immunity from crimes within the ICC’s jurisdiction to officials of the United States. This in effect means that where a government official from the United States, for example, commits SGBCs during an armed conflict situation in a foreign state, that official will be immune from the jurisdiction of the ICC. By December 2006, of the 46 state parties which had signed BIAs with the United States, 24 were African states<sup>1334</sup> – in many cases to avoid the United States from imposing economic penalties or withdrawing military aid.<sup>1335</sup>

### 5.3.5 Cooperation and judicial assistance of the state parties to the ACJHPR

The drafters to the Malabo Protocol, mindful that non-cooperation as in the case of Al-Bashir, could occur with its state members, included a provision in the statute annexed to the Malabo Protocol which is similar to that contained in the Rome Statute of the ICC.<sup>1336</sup> The statute of the ACJHPR provides for ‘state parties to cooperate with the Court in the investigation and prosecution of persons accused of committing the crimes defined’.<sup>1337</sup> It would be helpful for the OTP of the ACJHPR to follow the lead of the ICC by putting in place provisions to enhance cooperation with its state members, thereby enhancing investigation and prosecution of SGBCs. Like the OTP of the ICC, the OTP of the ACJHPR will need to develop its own ‘strategy and action plan to support arrests’<sup>1338</sup> and surrender of perpetrators of SGBC. This would be ‘with a view to increasing the effectiveness and efficiency of cooperation and

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renewed by the Council under the same conditions.’

<sup>1333</sup> Coalition for the International Criminal Court ‘Status of United States bilateral immunity agreement’ available at [http://www.iccnw.org/documents/CICCFs\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFs_BIAstatus_current.pdf) (accessed on 14 March 2017).

<sup>1334</sup> *Ibid.*

<sup>1335</sup> *Ibid.* Fohrid Human Rights and Democratic Forum ‘International Criminal Court, article 98(2) and bilateral immunity agreement’ (2011) p 8 [www.fohrid.org.np/.../2-international-criminal-court-article-98-2-and-bilateral-immu](http://www.fohrid.org.np/.../2-international-criminal-court-article-98-2-and-bilateral-immu) (accessed 14 March 2017).

<sup>1336</sup> See section 5.3.4(ii) above.

<sup>1337</sup> Statute of the African Court of Justice and Human and Peoples’ Rights, art 46L(1).

<sup>1338</sup> ICC-OTP, Strategic Plan| 2016-2018 at 13. Strategic goal 6 deals with the ICC’s goal to ‘strengthening cooperation and promoting general support towards the mandate and activities of the office.’

impact’<sup>1339</sup> of its operations in prosecuting SGBCs. Given that sufficient resources need to be ploughed into this plan to be effective,<sup>1340</sup> the OTP of the ACJHPR may face struggle to obtain full financial cooperation from state parties. Lack of a strategy and action plan could present a good excuse for state parties not to cooperate with the OTP of the ACJHPR. This would undermine the credibility of the ACJHPR as it needs state cooperation with the enforcement of warrants, the investigations of situations and compliance with requests.

With regard to facilitating cooperation in preliminary examinations, investigations and trials, the OTP of the ACJHPR, like the OTP of the ICC could:

Ensure that there is strategic and operational advice and cooperation support available to the integrated teams. This includes effectively making and following-up on requests for assistance, galvanizing efforts in cooperation with other actors for the arrest and surrender of individuals sought by the ICC, and maintaining general cooperation; and consolidating and further expanding the Office’s network of general and operational focal points and judicial actors, and streamlining and standardising processes and interactions with partners (States, international and regional organisations, NGOs).<sup>1341</sup>

The OTP of the ACJHPR will also need to engage continually with its stakeholders so that they may understand its work and mandate relating to bringing crimes of SGBV to trial.<sup>1342</sup>

State parties to the ICC, which decide to remain in the ICC and ratify the Malabo Protocol, may find that their obligations to cooperate with the ICC and the ACJHPR conflict on account of the overlapping jurisdiction of the courts. It is therefore necessary for the ICC and the ACJHPR prevent such conflicting obligations, since both have the goal of ending impunity for SGBCs. The OTP of the ICC’s states as a strategic goal the need not only to address ‘situation-related cooperation in support of investigations and prosecutions, but also general diplomatic and political support towards the Office and its mandate’. To enable it to do so, the OTP of the ICC states that it

... will engage in coordination with other court organs as appropriate, with states, regional and international organisations, NGOs and (other) networks to further increase understanding of the Office’s work and mandate, and to ensure continued general and diplomatic support for the mandate, activities and resource requirements of the Office from relevant stakeholders.<sup>1343</sup>

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<sup>1339</sup> *Ibid.*

<sup>1340</sup> *Ibid* (stating that ‘[t]he office must continue to dedicate sufficient resources to facilitate cooperation, and to continue its strategic review of how to address the key obstacles impacting cooperation’.)

<sup>1341</sup> *Idem* at 26.

<sup>1342</sup> *Ibid.*

<sup>1343</sup> *Ibid.*

Reference to the OTP of the ICC's willingness to 'engage in coordination with other court organs' and with regional organisations is an indication that this could include the ACJHPR. Under article 46L of the statute to the ACJHPR:

The Court shall be entitled to seek the cooperation or assistance of regional or international courts, non-State Parties or cooperating partners of the African Union and may conclude Agreements for that purpose.<sup>1344</sup>

Reference to the ACJHPR seeking cooperation or assistance from international courts is an indication of its willingness to work with the ICC, in terms of which both courts may conclude agreements.

### **5.3.6 The complementary principle in the Malabo Protocol**

Article 46H of the statute annexed to the Malabo Protocol provides for complementary jurisdiction at the ACJHPR. Paragraphs 2, 3 and 4 of article 46H (except for the omission of the word 'genuine' relating to prosecution of cases), is worded similarly to article 17 of the Rome Statute,<sup>1345</sup> which provides for the steps which the ICC should take to have a case admitted before it. However, paragraph 1 of article 46H contains a provision which is not found in article 17 of the Rome Statute, namely: 'The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.' Under the Rome Statute, the ICC acts as a court of last resort when national courts fail to prosecute, according to the principles set out in article 17 of the Rome Statute.<sup>1346</sup> In the case of the ACJHPR, the court will only act where national courts and courts of the Regional Economic Communities (RECs) have failed to prosecute one of the crimes within its jurisdiction. Out of the eight RECs, which the AU recognises, only four of them, namely the Economic Community of West African States (ECOWAS), Common Market for Eastern and Southern Africa (COMESA), EAC (East African Community) and Southern African Development Community (SADC) are operational, although the SADC tribunal is presently suspended.<sup>1347</sup> Given that none of these courts have jurisdiction to try international

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<sup>1344</sup> Statute of the African Court of Justice and Human and Peoples' Rights, art 46L(3).

<sup>1345</sup> Rome Statute, art 17 deals with the issue of admissibility of cases before the ICC.

<sup>1346</sup> The preamble to the Rome Statute emphasises that the ICC shall be complementary to national courts jurisdictions. Article 1 of the Rome Statute provides that the ICC shall be complementary to national court's jurisdiction.

<sup>1347</sup> The other four REC courts recognised by the AU are the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Economic Community of Central African States (ECCAS) and Intergovernmental Authority on Development (IGAD). Philomena Apiko and Faten Aggad 'The International



crimes, complementarity in relation to SGBCs and other crimes within the ACJHPR's jurisdiction can only operate between the ACJHPR and national courts.<sup>1348</sup> This would entail all REC courts changing their constitutions to accommodate this provision in paragraph 1 of article 46H, for the reason that it would be cumbersome for the REC courts to have jurisdiction to try international crimes. Considering complementarity not just from a national aspect, but also from the REC aspect, would not help reduce the OTP of the ACJHPR's financial costs. Abass, points out further problems that would be encountered in bringing a case before a national court and then the courts of the REC, before bringing it to the ACJHPR. First, which REC should hear the case, as most African states belong to two or more RECs<sup>1349</sup> and, in any event, have overlapping memberships, as in COMESA and SADC.<sup>1350</sup> Secondly, individuals do not have an automatic right to bring a matter before REC courts.<sup>1351</sup> For these reasons, it is necessary for the drafters of the Malabo Protocol to amend the Protocol for the complementarity principle to exclude these courts.

One of the ways in which the OTP of the ACJHPR could reduce the cost of prosecuting SGBCs at the regional level whilst making sure that the impunity gap for these crimes is closed, is by adopting a positive complementarity approach just as adopted by the OTP of the ICC in its 2009-2012 prosecutorial strategy.<sup>1352</sup> This approach would involve the OTP of the ACJHPR encouraging 'genuine national proceedings where possible (situation countries included), relying on its various networks of cooperation, but without involving the office directly in capacity building or financial or technical assistance'.<sup>1353</sup> By engaging with and supporting African states in their national proceedings, it would enable states to carry out their duty to investigate and

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Criminal Court, Africa and the African Union: what way forward?' (2016) available at [www.ecdpm.org/wp-content/.../DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf](http://www.ecdpm.org/wp-content/.../DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf) (accessed 23 February 2017).

<sup>1348</sup> *Ibid.*

<sup>1349</sup> Abass 'Prosecuting international crimes in Africa' at 945. Abass gives as example the Economic Community of West African States (ECOWAS) and the Community of Sahel-Saharan States (CEN-SAD).

<sup>1350</sup> *Ibid.*

<sup>1351</sup> *Ibid.*

<sup>1352</sup> Prosecutorial Strategy, 2009-2012, 1 February 2010 at 5 available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2010> (accessed 1 November 2016). Burke-White prefers to adopt the term proactive complementarity as it 'better reflects the nature of the policy and better highlights its distinction from the court's present approach', which he says may be termed 'passive complementarity.' William W Burke-White 'Proactive complementarity: The International Criminal Court and national courts in the Rome System of international justice' (2008) 49 *Harvard International Law Journal* 48 at 49.

<sup>1353</sup> *Ibid.* In comparison, applying Burke-White's 'proactive complementarity' suggestion 'recognises that the ICC can and should encourage, and perhaps even assist, national governments to prosecute, international crimes'. Proactive complementarity recognises that some outside assistance may allow states to undertake prosecutions when they lack the means to do so alone.' *Idem* at 56 and 58.

prosecute SGBCs. In a draft withdrawal strategy document, the AU suggests that states should strengthen their ‘legal regulatory frameworks and judicial mechanisms’ so as to try international crimes, in order to limit the ICC’s intervention in such crimes<sup>1354</sup> by ‘developing continental, regional and national strategies such as model national laws and capacity building programmes (that is training, experience, exchange programmes etc).<sup>1355</sup> The draft paper also urges states to ratify and domesticate the Malabo Protocol, as this would enhance the complementarity principle ‘in order to reduce the deference to the ICC and further the mantra of an African solution to African problems’.<sup>1356</sup> The AU needs to include the ICC in the notion of complementarity if all institutions are to help close the gap of impunity relating to SGBCs on the continent. For the positive complementarity approach to work effectively, it should operate directly between the ACJHPR and national courts without having situations considered by RECs. This would enable the OTP of the ACJHPR to directly assist states in investigating and prosecuting SGBCs, and would eliminate delays by states unwilling or unable to investigate and prosecute SGBCs.

Once the Malabo Protocol comes into force, the ACJHPR and the ICC will have overlapping jurisdictions regarding SGBCs. Article 46H of the Malabo Protocol does not specify how the complementarity principle would work between the ACJHPR and the ICC. The ACJHPR provides for regional criminal jurisdictions while the Rome Statute provides that the ICC ‘shall be complementary to national criminal jurisdictions’.<sup>1357</sup> The ICC has established that a case under article 17(1) (a) of the Rome Statute would be admissible before it where national investigations did not include the same individual and conduct as those in the ICC proceedings.<sup>1358</sup> Overlapping jurisdiction of the ICC and the ACJHPR would vitiate complementarity where both courts investigate and prosecute the same perpetrator of SGBCs for

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<sup>1354</sup>African Union, Draft 2 Withdrawal strategy document, p 12 available at [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf) (accessed 16 February 2017).

<sup>1355</sup> *Ibid.*

<sup>1356</sup> *Ibid.*

<sup>1357</sup> Rome Statute, Preamble at para 10. See also Rome Statute, article 1 that also provides that the ICC shall be complementary to national criminal jurisdictions.

<sup>1358</sup> *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ‘Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute’ at para 36. *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ‘Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute’ at para 37.

the same crime at the same time.<sup>1359</sup> This scenario is unlikely as each court would seek to maximise their costs.<sup>1360</sup> It would be best for both courts to agree to their complementary jurisdiction and amend their statutes accordingly. Although Kenya proposed an amendment to the Rome Statute's Preamble regarding the complementarity principle so as to include regional criminal jurisdictions, no such proposal has been made by any African state regarding article 46H of the Malabo Protocol.<sup>1361</sup> The proposed amendment to the Rome Statute's preamble 'Emphasise[d] that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions'.<sup>1362</sup>

The 12<sup>th</sup> session of the Assembly of State Parties was not able to adopt Kenya's proposed amendments, as Kenya had not given the proposed notification to state parties as required by the Rome Statute.<sup>1363</sup> These proposed amendments and the other amendments are pending.<sup>1364</sup>

### 5.3.7 Complementing or not complementing?

Having considered the role which the AU has played in bridging the impunity gap for SGBCs committed in Africa at the regional level, it is necessary to consider whether prosecuting these crimes at the regional level complements and/or bridges the impunity gap of the ICC. Appraising

<sup>1359</sup> Du Plessis argues that the ICC would not be barred from prosecuting the same case, which the ACJHR is prosecuting. His reasoning for this is that article 17 of the Rome Statute refers only to states. Max du Plessis 'Implications of the African Union decision to give the African Court jurisdiction over international crimes' (2012) 235 *Institute for Security Studies Paper* 1 at 11.

<sup>1360</sup> In Rau's opinion lack of clarity as to a court's jurisdiction in the case of overlapping jurisdictions could result in competition between them regarding their jurisdictional precedence in the case. For instance, courts could compromise their legitimacy by handing down lighter sentences, giving acquittals, which are unwarranted, or result in politicised benches. There could also be uncertainty between different groups such as defendants, victims and the prosecutor. Kristen Rau 'Jurisprudential innovation or accountability avoidance? The International Criminal Court and proposed expansion of the African Court of Justice and Human Rights' (2012) 97 *Minnesota Law Review* 669 at 695.

<sup>1361</sup> Other proposals made by Kenya included article 63 of the Rome Statute relating to trials in the presence of the accused, article 27 of the Rome Statute relating to irrelevance of official capacity, article 70 of the Rome Statute relating to offences against administration of justice and article 112(4) of the Rome Statute relating to establishing an Independent Oversight Mechanism. South Africa has also made a proposed amendment to article 16 of the Rome Statute. Proposed agenda items for the 12<sup>th</sup> session of the Assembly of state parties of the International Criminal Court regarding Kenya's proposed amendments, available at <http://scribd.com/doc/183221222/kenya-s-proposed-agenda-items-for-the-12th-Session-of-the-Assembly-of-State-Parties> (accessed 28 May 2016). African Union, Draft 2 Withdrawal strategy document at 12.

<sup>1362</sup> *Ibid.*

<sup>1363</sup> Coalition for the International Criminal Court 'Report of the twelfth session of the Assembly of State Parties to the Rome Statute' (2013) p 20 available at [www.iccnw.org/documents/asp12\\_report.pdf](http://www.iccnw.org/documents/asp12_report.pdf) (accessed 29 May 2016). Article 121(2) of the Rome Statute provides that three months notification should be given. The article provides that: No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

<sup>1364</sup> African Union, Draft 2 Withdrawal strategy document at 12.

the prosecution these crimes at the regional level did not entail instituting international tribunals such as, the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). Although the ICTR and SCSL played a part in prosecuting SGBCs committed in armed conflict in Africa, they were statutorily limited by time and territory.

The ICC's challenge to its credibility and effectiveness in bridging the impunity gap for crimes within its jurisdiction can be dealt with by obtaining cooperation from member states in arresting and surrendering alleged perpetrators of these crimes, establishing impartiality and overcoming financial constraints. The Rome Statute provides detailed provisions of the cooperation required from member states, though states such as Malawi, Chad, the DRC, South Africa, the Hashemite Kingdom of Jordan and Kenya, prefer to align with the AU's stance of not cooperating with the ICC, and would rather 'comply with the decisions and policies of the [African] Union'.<sup>1365</sup> Although the AU has accused the ICC of bias against African states, the conflict of interest between the ICC and the AU concerns the immunity of incumbent state officials who are from non-ICC member states. Thus, the interplay between articles 27(2) and 98(1) of the Rome Statute in cases where the Security Council refers a situation to the ICC (as in the SC's resolution relating to Al-Bashir), is a matter of dispute between the AU and ICC. It has not helped that legal scholars disagree on the interpretation of these articles, nor that different Pre-Trial Chambers have given different interpretations on this matter. To avoid further disputes between the ICC and state members of the ICC, the Security Council when making referrals to the ICC, should ensure that their resolutions are clearly worded to avoid ambiguity. The AU has decided to seek an advisory opinion from the ICJ, through the United Nations General Assembly on the relationship between articles 27 and 98, and 'other contested issues relating to the conflicting obligations of states parties to cooperation with the ICC'.<sup>1366</sup> A better option would be for the AU to defer requesting the advisory opinion from the ICJ pending the outcome of the appeal by Jordan to the ICC's Appeals Chamber (lodged on March 2018), against of the decision made against it by Pre-Trial Chamber II. The Pre-Trial Chamber held that Jordan failed to comply with the ICC's request for the arrest and surrender of Al-Bashir when he was on Jordanian territory in March 2017, and referred the matter to the Assembly of State Parties and

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<sup>1365</sup> Constitutive Act of the African Union, article 23(2).

<sup>1366</sup> African Union, Assembly, Thirtieth Ordinary Session, 'Decision on the International Criminal Court, Doc. EX.CL/1068 (XXXII)', 28-29 January 2018, Assembly/AU/Dec. 672(XXX), para 5(i).

the UNSC.<sup>1367</sup> The Pre-Trial Chamber granted Jordan's application to appeal against its decision on the following grounds:

- That [t]he Chamber erred in its findings regarding the effects of the Rome Statute upon the immunity of President Al-Bashir.
- That [t]he Chamber erred in concluding that Security Council resolution 1593 (2005) affected Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir.
- That [e]ven if the Chamber's December 2017 decision with respect to non-compliance was correct (*quod non*), the Chamber abused its discretion in deciding to refer such non-compliance to the Assembly of States Parties and to the Security Council.<sup>1368</sup>

The issues appealed against by Jordan include those questions on which the AU seeks an advisory opinion. Since the interpretation of articles 27 and 98 of the Rome Statute, (when there is a referral by the Security Council regarding the immunity of an incumbent state official belonging to a non-state party) relates to articles in the Rome Statute, the ICC Appeals Chamber would be in a better position to decide on the matter. Du Plessis and Tladi point out that the advantage of an ICJ advisory opinion would be that it would take 'a holistic view of all areas of international law'.<sup>1369</sup> On the other hand they warn that resorting to the ICJ for an advisory opinion runs the risk of causing a friction between 'two independent courts of international law'.<sup>1370</sup>

With regard to the OTP being impartial as to whom it investigates and prosecutes, it would be difficult for the ICC to sever itself from political considerations. As mentioned earlier,<sup>1371</sup> the DRC and Ugandan cases illustrate the difficulties the OTP faces in deciding whether to prosecute state officials accused of committing SGBCs. Although the ICC's Policy Paper on Case Selection and Prioritisation gives guidelines as to impartiality, the OTP still faces

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<sup>1367</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir*, 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir."' ICC-02/05-01/09 (12 March 2018).

<sup>1368</sup> *Ibid.*

<sup>1369</sup> Max du Plessis and Dire Tladi '[The ICC's immunity debate – the need for finality](https://www.ejiltalk.org/author/dtladi/)' (11 August 2017) available at <https://www.ejiltalk.org/author/dtladi/> (accessed 14 May 2018).

<sup>1370</sup> Max du Plessis and Dire Tladi '[The ICC's immunity debate – the need for finality](https://www.ejiltalk.org/author/dtladi/)' (11 August 2017) available at <https://www.ejiltalk.org/author/dtladi/> (accessed 14 May 2018).

<sup>1371</sup> Chapter 3, section 3.3.4. See also above at section 5.3.4(ii)

challenges regarding impartiality. In the recent ICC trial against Laurent Gbagbo, the former president of Cote d'Ivoire, it was alleged by the commissions of inquiry that both sides committed crimes within the ICC's jurisdiction, yet none of Alassane Ouattara armed supporters faction was indicted.<sup>1372</sup> With the Malabo Protocol in its current form, article 46A bis adopts the customary international law position on immunity, by granting blanket immunity to heads of state and state officials and so the OTP at the ACJHPR would not face the problem of impartiality directly, even though in reality there will be instances of impartiality. Indictments issued by the OTP will be one-sided prosecutions of rebels, militia groups and those who oppose the government, as the court cannot indict incumbent heads of state and state officials accused of committing SGBCs. This blanket provision is one of the disadvantages of prosecuting SGBCs before the ACJHPR. Although the ICC faces impartiality challenges, the Rome Statute does give the Prosecutor the discretion as to whom to prosecute.

The failure of states to pay their contributions 'in full or in a timely manner' at the ICC jeopardises the daily operations of the court. In order to meet shortfalls in its member states' financial contributions, the ICC resorts to using its Working Capital Fund at the end of that particular year.<sup>1373</sup> The ACJHPR is likely to face greater financial challenges than the ICC, bearing in mind that it will also prosecute cases other than SGBCs. For example, the ACJHPR must be prepared to face such challenges in line with the ICC's practice of diverting resources for unforeseeable events – such as Bosco Ntaganda's surrender and new investigations not anticipated.<sup>1374</sup>

Buttressed by a regional court to try crimes peculiar to Africa, including SGBCs committed in armed conflict, the ACJHPR should play a vital role in the prosecution of these crimes, thereby bridging the impunity gap. However, the same three constraints mentioned above, which limit the ICC's effectiveness in prosecuting crimes within its jurisdiction, will also apply to the ACJHPR to an even greater extent, bearing in mind the human resources it will require compared to the ICC, and the types of crimes that it will investigate and prosecute. In addition, as suggested above, there is a need to redraft the Malabo Protocol by removing or

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<sup>1372</sup> See Sophie Rosenberg 'The International Criminal Court in Cote d'Ivoire, Impartiality at Stake?' (2017) 15 *Journal of International Criminal Justice* 471 at 472. (Rosenberg in her article provides a critical assessment of the ICC's alleged impartiality in the case against Laurent Gbagbo).

<sup>1373</sup> ICC Assembly of State Parties, Report of the Committee on Budget and Finance on the work of its Twenty-seventh Session, ICC-ASP 15/15, 28 October 2016, para 22.

<sup>1374</sup> ICC-OTP, Strategic plan | 2016 – 2018, para 18.

redrafting article 46A bis so that the OTP of the ACJHPR can make an informed decision on whom to prosecute. Also, a provision in the Malabo Protocol to increase its number of judges, where the need arises, is called for, as is the case with the Rome Statute.<sup>1375</sup> Consideration should also be given to the amendments suggested in section 5.3.2 relating to the crimes of genocide, crimes against humanity and war crimes.

## 5.4 CONCLUSION

This chapter, which examined the Malabo Protocol adopted by the AU to establish a regional court to try crimes peculiar to Africa, concentrated on crimes of SGBV committed in armed conflicts under the proposed ACJHPR jurisdiction. The examination was to assess whether the creation of the first permanent regional tribunal to try ‘international’ crimes would be effective in closing the impunity gap for SGBCs committed in armed conflicts at the regional level. Many criticisms about the Malabo Protocol have raised concern whether the Protocol adds value to the movement for the prosecution of international crimes. Whatever the case, the fact remains that Africa needs a regional court which can effectively investigate and prosecute SGBCs, especially as these crimes are prevalent on the continent.

In examining, the Malabo Protocol in the context of the crime of genocide, crimes against humanity and war crimes, it was found that there is the need to redraft the Malabo Protocol for successful investigation and prosecution of SGBCs at the regional level. Such includes removing or redrafting article 46A bis, and amending the genocide, crimes against humanity and war crimes articles. Although the case of *Dorothy Chioma Njemanze & 3 Others v The Federal Republic of Nigeria, ECOWAS Community Court of Justice* is welcomed, in that it establishes that victims of SGBCs can bring a case against a state in the ECOWAS Community Court of Justice, it is of concern that individuals and NGOs will face inordinate difficulties in bringing cases before the ACJHPR. Of concern also, is the threat of SGBV marginalisation, as it may be considered less important than the other crimes within the court’s jurisdiction for being not ‘ubiquitous and ongoing crimes’. Before redrafting the Malabo Protocol, the AU should obtain advice from legal experts on gender issues, international organisations, civil societies and NGOs, as their suggestions would help in rectifying the weaknesses of the Malabo Protocol.

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<sup>1375</sup> Rome Statute, art 36(2)(a) which provides that ‘The Presidency, acting on behalf of the Court may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate.’

The chapter also noted that the AU is not alone in having used an immunity clause to avoid the prosecution of sitting heads of states and senior officials, with powerful states such as the United States finding means of immunising their citizens from the ICC's jurisdiction. This has also resulted in the widening of the impunity gap for prosecuting perpetrators of SGBCs in the ICC.

This chapter also contends that, however justified the AU's claims against the ICC might be, the AU needs to put aside its political differences with the ICC and work closely with it in closing the impunity gap for SGBV. The AU should thus encourage African states to remain in the ICC, especially as it appears unlikely that the ACJHR will come into operation in the near future. In any event, it would take years for the AU to find its way to obtaining successful prosecutions for SGBCs, bearing in mind that these crimes are amongst the most difficult to prosecute. As a result, the AU will need the ICC's assistance, drawing on its experience and learning from its mistakes if perpetrators of SGBV are to be accountable for these crimes.

This chapter also found that funding the ACJHR, and the fact that the AU prefers to enter into peace deals with perpetrators of human right crimes rather prosecute them, would present obstacles to investigating and prosecuting SGBCs. Although the AU claims in its CA its commitment 'to combat impunity and promote democracy [and] the rule of law and good governance',<sup>1376</sup> this determination is directed at rebel fighters, those in opposition to the government in question and former heads of state – as with Hissene Habre, former president of Chad. In that case, the AU and Senegal inaugurated the Extraordinary African Chamber, in Senegal to try Hissene Habre.<sup>1377</sup> As will be seen in the next chapter, entering into peace deals is not necessarily the best solution; although the government of the DRC entered into various peace deals with their opponents, this did not prevent perpetrators from committing SGBV on all sides. This chapter concludes that until the AU removes the loopholes in the Malabo Protocol, the ACJHR will not be a reliable court for the successful prosecution of SGBCs committed in armed conflict situations. At this stage, although the ICC and the AU are not at best of terms, the ICC is the better of the two courts to prosecute SGBCs committed in armed conflict in Africa.

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<sup>1376</sup> African Union, Assembly, Thirtieth Ordinary Session, 'Decision on the International Criminal Court, Doc. EX.CL/1068 (XXXII)', 28-29 January 2018, Assembly/AU/Dec. 672(XXX), para 2(1).

<sup>1377</sup> See Section 5.3.4(i), footnote 205.



## CHAPTER 6

### IMPLEMENTING THE ROME STATUTE IN THE DEMOCRATIC REPUBLIC OF CONGO'S DOMESTIC LAW RELATING TO SEXUAL AND GENDER-BASED CRIMES COMMITTED IN ARMED CONFLICTS

*In 2002, she had been abducted with her uncle by the FDLR. They were each tied to a tree by their hands and feet, and she watched while he died after they cut off his genitals. She remained tied to the tree for two weeks, raped at will by her abductors repeatedly, and she became pregnant.<sup>1378</sup>*

#### 6.1 INTRODUCTION

The DRC signed the Rome Statute on 8 September 2000, and ratified it according to legislative decree No. 0013/2002 of 30 March 2002.<sup>1379</sup> On 11 April 2002, the DRC deposited the instruments which ratified the Rome Statute.<sup>1380</sup> On 31 December 2015, its President promulgated the adoption of the bill, implementing the International Criminal Court's (ICC's) Rome Statute in the Democratic Republic of Congo's (DRC's) domestic laws upon approval by its National Assembly and Senate on 10 December 2015.<sup>1381</sup> The long-awaited promulgation of Rome Statute into the DRC's domestic laws demonstrated the government's willingness to investigate and prosecute international crimes within the ICC's jurisdiction, and end impunity for sexual and gender-based violence (SGBV). Although the DRC operates a monist legal system, the promulgation of the Rome Statute, published in the DRC's Official Journal<sup>1382</sup>, will allow the DRC give full effect to the Rome Statute and have its domestic laws amended in line with the Rome Statute. This will strengthen the DRC's legal framework in areas where its judicial system is weak, thereby making it possible to make perpetrators of crimes within the ICC's jurisdiction

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<sup>1378</sup> A victim of rape in the Kivu Province of the DRC describing her ordeal to a United Nations Panel of Experts in 2010. OHCHR 'Report of the Panel on remedies and reparations for victims of sexual violence in the Democratic Republic of Congo to the High Commissioner for the Human Rights' (3 March 2011) para 24.

<sup>1379</sup> Office Journal of the Democratic Republic of Congo, Office of the President of the Republic, 29 February 2016.

<sup>1380</sup> Avocats Sans Frontières 'Case study, The application of the Rome Statute of the International Criminal Court by the courts of the Democratic Republic of Congo at 10 available at [www.asf.be/wp-content/.../ASF\\_CaseStudy\\_RomeStatute\\_Light\\_PagePerPage.pdf](http://www.asf.be/wp-content/.../ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf) (accessed 10 October 2016).

<sup>1381</sup> The documents implementing the Rome Statute into the DRC's laws are dated 31 December 2015, whereas Parliamentarians for Global Action (PGA) state that the date on which the DRC's President promulgated the Laws was 2 January 2015. PGA 'PGA welcomes the enactment of the implementing legislation of the Rome Statute of the International Criminal Court by the Democratic Republic of Congo' available at <http://www.pgaction.org/news/pgawelcomes-enactment-drc-implementing.html> (accessed 29 August 2016).

<sup>1382</sup> In an email to me, Marion Chahuneau, Programme Officer for PGA confirmed that they were published in the Journal Officiel de la Republique Democratique du Congo, on 29 February 2016.

accountable. The DRC will also be able to fulfil its primary duty ‘to exercise its criminal jurisdiction over those responsible for international crimes’.<sup>1383</sup>

Although the DRC is a party to other international treaties and instruments<sup>1384</sup> which prohibit SGBV committed in armed conflict situations, the focus of this chapter will be to examine the Act which implements the Rome Statute into the DRC’s domestic laws, and its impact on the investigation and prosecution of SGBV committed in armed conflicts. This chapter considers the DRC, where SGBV committed in armed conflict is prevalent, as a case study to assess whether the application of the Rome Statute’s principles at the domestic level can bridge the impunity gap relating to SGBV committed in armed conflicts.

This chapter comprises three sections. The first gives a brief historical account of SGBV in the DRC to provide a picture of the problem of SGBV committed in armed conflicts. The second dwells on the laws relating to SGBV in the DRC before the promulgation of the Rome Statute in its domestic laws. The DRC’s Constitution prohibits SGBV against women, the high rate of which, according to Yarkin Erturk, was due to discrimination against and oppression of women. In spite of the fact that the 2006 laws of the civil courts prohibited rape and other SGBVs, the prosecution of these crimes by the civil courts was rare. The military court’s laws on the other hand were not consonant with international war crimes. For example, the definition of genocide, war crimes and crimes against humanity in the military court’s Penal Code differed from that of the Rome Statute. The last section considers the application of the Rome Statute in the DRC with regard to such issues as complementarity, head of state immunity and cooperation between the DRC and the ICC. It also considers what steps the DRC’s judiciary should take

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<sup>1383</sup> Rome Statute, Preamble.

<sup>1384</sup> IHL Conventions which the DRC has ratified are the Geneva Conventions (GC) of 1949 (ratified in 1961), the First Additional Protocol of 1977 to the GC (ratified in 1982), and the Second Additional Protocols of 1977 to the GC which (ratified in 2002). Also ratified by the DRC are the Hague Convention 1954 (ratified in 1961) and the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (ratified in 1962). With regard to international human rights instruments relating to SGBV these are: the International Covenant on Civil and Political Rights and its Optional Protocol (both ratified in 1976), the International Covenant on Economic, Social and Cultural Rights (ratified in 1976), the Convention on Elimination of all forms of Discrimination against Women (ratified in 1986), the African Charter on Human and Peoples’ Rights (ratified in 1987), the Convention on the Rights of the Child (ratified in 1990), the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in armed Conflict (ratified in 2001), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (ratified in 1996), and the African Charter on Rights and Welfare of the Child (ratified in 2001). United Nations Human Rights ‘Report of the mapping exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003’ (2010) at 339 – 343 available at: [www.ohchr.org/Documents/Countries/.../DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](http://www.ohchr.org/Documents/Countries/.../DRC_MAPPING_REPORT_FINAL_EN.pdf) (accessed 31 August 2016).

when applying the Rome Statute in the investigation and prosecution of SGBV, to avoid making the same mistakes made by the ICC.

## **6.2 SEXUAL AND GENDER-BASED VIOLENCE IN THE DEMOCRATIC REPUBLIC OF CONGO**

The conflicts and wars in the DRC date back to colonial regimes, particularly that of King Leopold II, who colonised the DRC in 1885.<sup>1385</sup> In recent years, the DRC has experienced two successive wars where crimes of SGBV have been widespread and prevalent, especially in the eastern Congo region.<sup>1386</sup> An OHCHR report attributes the high number of rapes in the DRC to its wars.<sup>1387</sup> On the other hand, the Special Rapporteur on violence against women, Yakin Erturk, attributes the high number of rapes in the DRC's armed conflict to 'gender-based discrimination in the society at large – discrimination against women and their oppression in virtually every sphere of life'.<sup>1388</sup>

In the DRC, SGBV in armed conflict was a weapon of war used to terrorise, punish and destroy communities and families for collaborating with opposing armed groups or the Congolese army, and to displace people from communities rich in resources.<sup>1389</sup> Perpetrators have also exploited civilians' vulnerability in armed conflict situations to commit SGBVs.<sup>1390</sup> Various forms of SGBV took place in the DRC, such as gang rape, sexual slavery, members of families being forced to rape each other and the dismembering of victims such as cutting off their

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<sup>1385</sup> International Legal Assistance Consortium 'Rebuilding courts and trust: an assessment of the needs of the justice system in the Democratic Republic of Congo' (August 2009) at 12 available at: [www.uneca.org/sites/default/files/.../conflicts\\_in\\_drc\\_eng\\_25sept\\_rev1.pdf](http://www.uneca.org/sites/default/files/.../conflicts_in_drc_eng_25sept_rev1.pdf) (accessed 30 August 2016). Democratic Republic of the Congo: How did the colonialism affect the people in Congo? available at <http://southwest.mpls.k12.mn.us/uploads/congocasestudy.pdf> (accessed 30 August 2016) (stating that King Leopold II's claim to the DRC was recognised by Europe at the Belgium Conference in 1885).

<sup>1386</sup> OHCHR 'Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo' at para 7 (April 2014) available at: <https://www.hrw.org/reports/2002/drc/Congo0602.pdf> (accessed 30 August 2016).

<sup>1387</sup> *Ibid.* OHCHR 'Report of the Panel on remedies and reparations for victims of sexual violence' at para 142.

<sup>1388</sup> Report of the Special Rapporteur, Yakin Erturk, on violence against women, its causes and consequences, UN Human Rights Council, A/HRC/7/6/Add.4(28 February 2008) at 16 available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/7session/A.HRC.7.6.Add.4.doc> (accessed on 30 August 2016).

<sup>1389</sup> OHCHR 'Progress and obstacles in the fight against impunity' at para 7. Human Rights Watch 'The war within the war, sexual violence against women and girls in eastern Congo' (June 2002) at 1 and 23 available at: <https://www.hrw.org/reports/2002/drc/Congo0602.pdf> (accessed 30 August 2016).

<sup>1390</sup> *Ibid.*

genitals.<sup>1391</sup> In expressing her opinion of the SGBV committed in the DRC, Pritchett states it is indisputable that ‘the conflict in the Democratic Republic of Congo has a woman’s face’,<sup>1392</sup> attesting that civilian women and girls were the main victims of this conflict. Various non-state armed groups, foreign militia, state security forces such as the *Forces Armées de la République Démocratique du Congo* (FARDC) and the *Police Nationale Congolaise* (PNC), whose intended function was to protect civilians, were perpetrators of these crimes.<sup>1393</sup> In 2013 for instance, of the 689 cases of SGBV which occurred in an armed conflict situation, government security forces committed 31%.<sup>1394</sup> The apparent decline in conflict-related SGBVs in 2015 was attributed to underreporting of cases and limited access to conflict-affected areas.<sup>1395</sup> Of the 637 cases reported by the United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo (MONUSCO), armed groups committed 74% of the sexual crimes, whilst government security forces committed the remaining 26%.<sup>1396</sup> The rape of at least 40 women on a daily basis continued.<sup>1397</sup>

### 6.2.1 The genesis of sexual and gender-based violence in the Democratic Republic of Congo

The DRC has suffered from two recent wars: the first, the Congolese World War from 1996 to 1997 and the second, from 1998 to 2003,<sup>1398</sup> known as ‘Africa’s World War’.<sup>1399</sup> Margot

<sup>1391</sup> A. Peterman, T. Palermo and C. Bredenkamp ‘Estimates and determinants of sexual violence against women in the Democratic Republic of Congo (2011) 101(6) *American Journal of Public Health* at 1060. United Nations Human Rights ‘Report of the mapping exercise’ at 318.

<sup>1392</sup> Susan Pritchett ‘Entrenched hegemony, efficient procedure or selective justice? An inquiry into charges for gender-based violence at the International Criminal Court’ (2008) 17 *Transnational Law and Contemporary Problems* 265 at 268. Though women and girls are the main targets of SGBV committed in armed conflict, men are also raped. Like women, these men are also stigmatised. OHCHR ‘Report of the Panel on remedies and reparations for victims of sexual violence’ at paras 31, 32 and 50.

<sup>1393</sup> UNSC ‘Report of the Secretary-General on conflict-related sexual violence’ S/2016/361 April 2016) paras 32 and 33. Report of the Special Rapporteur, Yakin Erturk, on violence against women at 2 and 6.

<sup>1394</sup> UNSC ‘Report of the Secretary-General on conflict related sexual violence’ S/2015/203 (23 March 2015) para 23.

<sup>1395</sup> UNSC ‘Report of the Secretary-General on conflict related sexual violence’ S/2016/361(20 April 2016) para 34.

<sup>1396</sup> *Ibid.*

<sup>1397</sup> DRC: The forgotten rape capital of the world available at: <https://www.issafrica.org/iss-today/drc-the-forgotten-rape-capital-of-the-world> (accessed 25 March 2016). This does not preclude the fact that men also experience gender-based violence as also seen in the Bemba case.

<sup>1398</sup> World without genocide ‘Democratic Republic of Congo, 1996 to present’ available at: [www.worldwithoutgenocide.org/.../Conflict-in-the-Democratic-Republic-of-the-Congo-Wo...](http://www.worldwithoutgenocide.org/.../Conflict-in-the-Democratic-Republic-of-the-Congo-Wo...) (accessed on 31 August 2016). Vlassenroot points out that even though the signing of the Global and Inclusive Agreement on Transition in the Democratic Republic of Congo (Pretoria Agreement) led to the official end of the DRC wars, there has been an increase in the number of armed groups. Koen Vlassenroot ‘South Kivu: identity, territory and power in the Eastern Congo’ (2010) Usalama Project Report: Understanding Congolese Armed Groups, Rift Valley Institute at 8 available at:

Wallstrom, a former UN special representative on sexual violence in conflict, has also referred to the DRC as ‘the rape capital of the world’.<sup>1400</sup> The first Congolese World War is closely associated with the 1994 Rwandan genocide. When the Rwandan Patriotic Front (RPF), a Tutsi militia group defeated the Hutus during the Rwandan genocide, over one million Rwandan Hutus fled to eastern Congo in 1994.<sup>1401</sup> These refugees robbed and terrorised the locals. In 1996, the Banyamulenge, an ethnic group having affiliation with the Rwandan Tutsis retaliated by trying to get the Rwandans out of the country.<sup>1402</sup> This led to Congo’s first war. Laurent-Desire Kabila who was the leader of the Alliance of Democratic Forces for the Liberation of Congo (ADFL), with Uganda and Rwanda as his allies, invaded the Congo.<sup>1403</sup> They had taken control of eastern Congo by December 1996, and by May 1997, when they had taken control of Kinshasa, they overthrew Mobutu SeseSeko who had ruled the country for 35 years.<sup>1404</sup> Kabila declared himself President on 17 May 1997, and renamed the country, known as Zaire under Mobutu’s rule, as DRC.<sup>1405</sup> During Mobutu’s reign and until he was overthrown, many civilians were raped and tortured by his security services.<sup>1406</sup> The ADFL and their allied forces also raped and tortured civilians, and this continued even after Kabila became President.<sup>1407</sup>

Rwanda and Uganda with the help of Burundi started the second Congo War in 1998, when Kabila turned his back on them. Kabila got support from Zimbabwe, Chad, Angola, Sudan and Namibia to fight against them.<sup>1408</sup> Both sides, including the United Nations (UN) peacekeepers, raped women and children as young as six years old.<sup>1409</sup> When the Rwandan and

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[www.eprints.lse.ac.uk/.../Vlassenroot\\_South\\_Kivu\\_identity\\_territory\\_and\\_power\\_in\\_easter](http://www.eprints.lse.ac.uk/.../Vlassenroot_South_Kivu_identity_territory_and_power_in_easter) (accessed 2 September 2016). The Global and Inclusive Agreement on Transition in the Democratic Republic of Congo (Pretoria Agreement) was signed in Pretoria on 16 December 2002 available at: [www.peacemaker.un.org/drc-agreementontransition2002](http://www.peacemaker.un.org/drc-agreementontransition2002) (accessed 2 September 2016).

<sup>1399</sup>*Ibid.* Sara Meger ‘Rape of the Congo: Understanding sexual violence in the conflict in the Democratic Republic of Congo’ (2010) 28:2 *Journal of Contemporary African Studies* 119 at 124.

<sup>1400</sup> UN News Centre ‘Tackling sexual violence must include prevention, ending impunity – UN Official’ (April 2010) available at [www.un.org/apps/news/story.asp?NewsID=34502](http://www.un.org/apps/news/story.asp?NewsID=34502) (accessed 20 April 2016).

<sup>1401</sup> World without Genocide ‘Democratic Republic of Congo, 1996 to present.’

<sup>1402</sup>*The Christian Science Monitor* ‘A brief history of Congo’s wars’ (29 November 2011) available at [www.csmonitor.com/World/Africa/Africa.../2011/.../A-brief-history-of-Congo-s-wars](http://www.csmonitor.com/World/Africa/Africa.../2011/.../A-brief-history-of-Congo-s-wars) (accessed 31 August 2016).

<sup>1403</sup> *Ibid.*

<sup>1404</sup> *Ibid.*

<sup>1405</sup> *Ibid.*

<sup>1406</sup> United Nations Human Rights ‘Report of the mapping’ at 150. Gaelle Breton-Le Goff ‘Ending Sexual Violence in the Democratic Republic of Congo’ (2010) in *Fletcher Forum of World Affairs* 13 at 15.

<sup>1407</sup>*Idem* at 150 -152. *Ibid.*

<sup>1408</sup> World without Genocide ‘Democratic Republic of Congo, 1996 to present.’

<sup>1409</sup> Meger ‘Rape of the Congo’ at 126.

Ugandan troops failed to oust Kabila from power, they took control of North and South Kivu,<sup>1410</sup> and aligned with rebel groups against Kabila's government. The *Ressemblement Congolais pour la Democratie* (RCD), the Mai-Mai and the Movement for Liberation of Congo were some of the military groups, which came together.<sup>1411</sup> In January 2001, Kabila was assassinated and his son Joseph Kabila became President.<sup>1412</sup>

Despite agreements such as the Lusaka Ceasefire Agreement of 1999,<sup>1413</sup> the Pretoria Agreement of 2002,<sup>1414</sup> Uganda Luanda Agreement of 2002,<sup>1415</sup> Sun City Agreement of 2003,<sup>1416</sup> and Goma Peace Agreement of 2009,<sup>1417</sup> which were signed to bring the conflicts in the DRC to an end, the DRC still experienced instability and SGBV.<sup>1418</sup> There are more than 60

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<sup>1410</sup> United Nations Human Rights 'Report of the mapping exercise' at 153.

<sup>1411</sup> Stacy Branwell 'Rape and sexual violence in the Democratic Republic of Congo: a case study of gender-based violence' (2010) *Journal of Gender Studies* 45 at 48.

<sup>1412</sup> *The Christian Science Monitor* 'A brief history of Congo's wars.'

<sup>1413</sup> The Lusaka Ceasefire Agreement was signed on 10 July 1999 by Angola, the DRC, Namibia, Rwanda, Uganda and Zimbabwe. Zambia, the Organisation of African Unity, the United Nations, and the South African Development Community witnessed it. The parties to the agreement agreed to a 'ceasefire among all their forces in the Democratic Republic of Congo.' Also 'all foreign forces from the national territory of the Democratic Republic of Congo' were to withdraw from the DRC. The Lusaka Ceasefire agreement also provided that the granting of amnesty did not apply in the case of the crime of genocide. United Nations Security Council, Lusaka Agreement, S/1999/815, 10 July 1999, pars 1, 12 and 22 available at: [www.securitycouncilreport.org/un-documents/document/rol-s1999-815.php](http://www.securitycouncilreport.org/un-documents/document/rol-s1999-815.php) (accessed 31 August 2016).

<sup>1414</sup> The Pretoria Agreement was signed between the President of the DRC and Rwanda in Pretoria, South Africa, on the 30 July 2002. The agreement was for the withdrawal of Rwandan troops from the DRC and the 'dismantling of the ex-FAR (Rwandan Armed Forces) and Interahamwe (Rwandan Hutu Militia) forces in the DRC' available at: <http://www.irinnews.org/report/33230/drc-rwanda-text-pretoria-memorandum-understanding> (accessed 31 August 2016).

<sup>1415</sup> The Luanda Agreement of 6 September 2002 was an agreement between the governments of the DRC and Uganda for the 'withdrawal of Ugandan Troops from the DRC 'Cooperation and normalisation of relations between' both states' available at:

[www.beyondjuba.org/BJP1/.../Ug\\_gov\\_and DR Congo\\_gov\\_security\\_agreement.pdf](http://www.beyondjuba.org/BJP1/.../Ug_gov_and_DR Congo_gov_security_agreement.pdf) (accessed 31 August 2016).

<sup>1416</sup> This agreement, which was signed by the DRC government and the warring parties, such as the Congolese Rally for Democracy and Movement for the Liberation of Congo, in the second Congo war, was a culmination of the Inter-Congolese dialogue. It 'set the process for the transformation of the political climate within the DRC.' Inter-Congolese Political Negotiations, The Final Act (Sun City Agreement) available at [www.peacemaker.un.org/drc-suncity-agreement2003](http://www.peacemaker.un.org/drc-suncity-agreement2003) (accessed 31 August 2016).

<sup>1417</sup> This was an agreement where the CNDP confirmed 'its decision to cease its existence as a politico-military movement' and the DRC government undertook to respond 'to the CNDP's request for recognition as a political party.' Peace agreement between the government and *Le Congres National Pour La Defense du Peuple* (CNDP), Goma, DRC, art 1 (23 March 2009) available at [www.friendsofthecongo.org/images/pdf/cndp\\_accord.pdf](http://www.friendsofthecongo.org/images/pdf/cndp_accord.pdf) (accessed 31 August 2016).

<sup>1418</sup> Institute for War and Peace Reporting 'Sexual violence in the Democratic Republic of Congo'(2008) at 4 available at <http://www.ceipaz.org/images/contenido/Sexual%20violence%20in%20the%20Democratic%20Republic%20of%20Congo.pdf> (accessed 20 March 2017) (stating that instead of the Peace agreement of 2002 bringing an end to SGBV in the DRC, the situation became worse as rebel and government soldiers raped women and girls).



armed groups operating in the eastern Congo region, with North and South Kivu mostly affected.<sup>1419</sup>

### **6.3 DEMOCRATIC REPUBLIC OF CONGO'S DOMESTIC LEGISLATION PROHIBITING SEXUAL AND GENDER-BASED VIOLENCE IN ARMED CONFLICT SITUATIONS**

#### **6.3.1 The Constitution's Provisions Relevant to Sexual and Gender-based Crimes Committed in Armed Conflict**

The DRC Constitution prohibits sexual violence committed against women and promotes the elimination of such violence. Under article 14 of its Constitution, the government of the DRC commends 'the elimination of all forms of discrimination against women' and undertakes to 'take measures to combat all forms of violence against women in public and private life'.<sup>1420</sup> Article 15 specifically mentions that the 'government shall ensure the elimination of sexual violence'. The article further states that:

Without prejudice to international treaties and agreements, any sexual violence against any person with the intent to destabilise, dislocate a family and eliminate an entire people is a crime against humanity punishable by law.<sup>1421</sup>

Thus, under article 15 of the Constitution there is the classification of sexual violence as a crime against humanity when committed 'against any person with the intent to destabilise, dislocate a family and eliminate an entire people'. Article 16 of the Constitution recognises the human rights of a person, stating that:

The State has an obligation to respect and protect one. Everyone has the right to life, physical integrity and the free development of his personality in accordance with the law, public order, the rights of others and morals. No one shall be held in slavery or in any similar condition. No one shall be subject to cruel, inhuman or degrading treatment. No one shall be subjected to forced or compulsory labour.<sup>1422</sup>

#### **6.3.2 The DRC courts and sexual and gender-based laws applicable before them**

##### **6.3.2.1 Sexual offences within the civil and military courts jurisdiction of the DRC**

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<sup>1419</sup> Jeffrey Gettleman 'In Congo, wars are small and chaos is endless' *The New York Times* (30 April 2016) available at: [www.nytimes.com/2016/05/.../africa/in-congo-wars-are-small-and-chaos-is-endless.html](http://www.nytimes.com/2016/05/.../africa/in-congo-wars-are-small-and-chaos-is-endless.html) (accessed 31 August 2016).

<sup>1420</sup> Constitution of the Republic of the Democratic Republic of Congo amended by Law No 11/002 of 20 January 2011 revising certain articles of the Constitution of the Democratic Republic of Congo of 18 February 2006, art 14.

<sup>1421</sup> *Idem* at 15.

<sup>1422</sup> *Idem* at 16.

The civil and the military courts in the DRC have jurisdiction over criminal matters. With regard to the adoption of sexual offences in the DRC's civil jurisdiction, NGOs representing women in the DRC pushed for the adoption of these crimes in the national laws.<sup>1423</sup> In 2006 the NGOs were successful in getting the Congolese Parliament to adopt stringent laws relating to SGBCs.<sup>1424</sup> In this regard, amendments to the DRC's 1940 Penal Code and its 1959 Penal Procedure Code, drafted by a group of local NGOs,<sup>1425</sup> came into force in July 2006.<sup>1426</sup> Law 06/018 of July 2006, which amended the 1940 Penal Code, recognises in its preamble the fact that the DRC's wars of 1996 and 1998 exposed victims to a wide range of crimes including sexual violence.<sup>1427</sup> The preamble further states the necessity to revisit certain provisions of its Criminal Code to 'prevent and severely punish offences relating to sexual violence and ensure the systematic treatment of victims of these offences'.<sup>1428</sup> By modifying and supplementing the 1940 Penal Code, the new law integrated international humanitarian law rules relating to sexual violence offences to protect victims of such offences.<sup>1429</sup> Under the provisions of Law 06/018 of July 2006, rape is committed

... either by means of violent or serious threats, or by coercion against a person, directly or through a third party, or by surprise, through psychological pressure, or in a coercive environment, or "by abusing a person who by reason of illness, impairment of his faculties or any other accidental cause" would have lost the use of his senses or would have been deprived of it by some artifices:

(a) every man, whatever his age, who has introduced his sexual organ, even superficially into that of a woman, or any woman, whatever her age, who will have compelled a man to introduce even superficially his sexual organ in his;

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<sup>1423</sup> Breton-Le Goff 'Ending sexual violence in the Democratic Republic of Congo' at 22.

<sup>1424</sup> *Ibid.*

<sup>1425</sup> *Ibid.*

<sup>1426</sup> Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais available at [www.leganet.cd/Legislation/DroitPenal/Loi.06.018.20.07.3006.htm](http://www.leganet.cd/Legislation/DroitPenal/Loi.06.018.20.07.3006.htm) (accessed 16 March 2017). Loi n° 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais available at [www.leganet.cd/Legislation/DroitPenal/L.06.019.20.07.2006.htm](http://www.leganet.cd/Legislation/DroitPenal/L.06.019.20.07.2006.htm) (accessed 16 March 2017).

<sup>1427</sup> The French version reads 'Les guerres de 1996 et 1998 dans notre pays n'ont fait qu'empirer la situation économique déjà déplorable et provoquer des millions de victimes dont les plus exposées et visées sont cruellement frappées par les crimes de toutes catégories. Ces victimes ont été atteintes dans leur dignité, dans leur intégrité physique et morale, mais aussi, dans leur vie. Ainsi, de tels actes ne peuvent rester impunis à l'avenir.'

<sup>1428</sup> The French version reads 'Face à la nécessité de prévenir et de réprimer sévèrement les infractions se rapportant aux violences sexuelles et d'assurer une prise en charge systématique des victimes de ces infractions, il s'est avéré impérieux de revisiter certaines dispositions du Code pénal.'

<sup>1429</sup> The French version reads 'Ainsi, la présente loi modifie et complète le Code pénal congolais par l'intégration des règles du droit international humanitaire relatives aux infractions de violences sexuelles. De ce fait, elle prend largement en compte la protection des personnes les plus vulnérables notamment les femmes, les enfants et les hommes victimes des infractions de violences sexuelles.'



- (b) any man who has penetrated, even superficially, the anus, mouth, or other orifice of the body of a woman, or of a man by a sexual organ, by any other part of the body, or by an object anywhere;
- (c) any person who has introduced, even superficially, any other part of the body or any object into the vagina;
- (d) any person who has compelled a man or woman to penetrate his anus, his mouth, or any orifice of his body, by any sexual organ, for any part of the body or by any object whatsoever.<sup>1430</sup>

The *actus reus* of rape under the 2006 Law, is similar to that of rape as provided for in the Rome Statute's Elements of Crime, bringing rape under the 2006 Law in line with that of international criminal law.<sup>1431</sup> Recognising the fact that a man or woman can commit rape, the 2006 Law provides that perpetrators of rape, regardless of their sex, will be committed to imprisonment of five to 20 years and a fine. If the victim died because of the rape, life imprisonment would be the penalty for the perpetrator(s).<sup>1432</sup>

Other SGBCs similar to those provided for under the Rome Statute which were introduced into the DRC's national laws for the first time included sexual slavery, forced marriage, forced pregnancy, sexual mutilation, zoophile conduct and forced sterilisation.<sup>1433</sup> (Law No 06/019 of July 2006 amended and supplemented the 1959 Penal Procedure Code.<sup>1434</sup>) Law No 06/019 intended to ensure the prompt trial of cases relating to SGBV by providing for the preliminary examinations into these crimes to be undertaken within a month of the referral of the crime to its judicial authority and for the judicial proceedings relating to these cases to take place within three months.<sup>1435</sup> Both Law No 06/018 and Law No 06/019 apply to crimes committed after August 2006. Thus, there could be no trial of any gender-based crimes provided for under Law No 06/018 that occurred before August 2006.<sup>1436</sup> This created an impunity gap in the prosecution of these crimes, as the existing 1940 Penal Code only provided for the prosecution of crimes of rape, indecent assault and outrage to public morality.<sup>1437</sup> The definition

<sup>1430</sup> Loi n° 06/018 du 20 juillet 2006, art 170(2) under art 2.

<sup>1431</sup> Rome Statute Elements of Crime art 7(1)(g)-1 and 8(2)(b)(xxii)-1.

<sup>1432</sup> Loi n° 06/018 du 20 juillet 2006, arts 170(2) and 171 under article 2.

<sup>1433</sup> *Idem* at art 3. Zoophile is a sexual disorder where a person is attracted to animals or has sexual intercourse with animals. Medical Definition of Zoophilia – Medicine Net available at [www.medicinenet.com/script/main/art.asp?articlekey=11824](http://www.medicinenet.com/script/main/art.asp?articlekey=11824) (accessed 10 May 2017).

<sup>1434</sup> Loi n° 06/019 du 20 juillet 2006.

<sup>1435</sup> The French version reads 'Sans préjudice des dispositions légales relatives à la procédure de flagrante, l'enquête préliminaire en matière de violence sexuelle se fait dans un délai d'un mois maximum à partir de la saisine de l'autorité judiciaire. L'instruction et le prononcé du jugement se font dans un délai de trois mois maximum à partir de la saisine de l'autorité judiciaire.'

<sup>1436</sup> Breton-Le Goff 'Ending sexual violence in the Democratic Republic of Congo' at 29.

<sup>1437</sup> *Ibid.*

of rape in the 1940 Penal Code did not conform to the definition of rape under international criminal law, as is the case with Law 06/018. But although the 2006 laws ended impunity for SGBCs, the imposition of harsh sentences was rare, and most perpetrators escaped imprisonment with resultant injustice to their victims.<sup>1438</sup>

With regard to military justice, the military police tribunals, garrison military tribunals, military courts and operational military courts, and the Military High Court can deliver justice in the DRC military.<sup>1439</sup> Military courts and tribunals have jurisdiction over members of the DRC's armed forces and its national police force, rebels and civilians who commit crimes under the rules of the DRC's army.<sup>1440</sup> These military courts and tribunals also have jurisdiction to hear crimes specified in the Military Penal Code, but this is subject to the provisions of articles 117 and 119 of the Military Judicial Code.<sup>1441</sup> The crimes specified in the 2002 Military Penal Code over which the military courts and tribunals have exclusive jurisdiction are the crimes of genocide, crimes against humanity and war crimes.<sup>1442</sup> In including these crimes into the Military Penal Code, the DRC partially adopted the Rome Statute's complementary provisions.<sup>1443</sup> The Military Penal Code specifically lists 'rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation and other forms of sexual violence of

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<sup>1438</sup> Institute for War and Peace Reporting 'Sexual violence in the Democratic Republic of Congo' at 4.

Erturk states that 'the law enforcement and justice authorities have been unable and in many instances are apparently also unwilling, to implement the law' Report of the Special Rapporteur, Yakin Erturk, on violence against women at 16.

<sup>1439</sup> Loi n° 023/2002 du 18 Novembre 2002 Portant Code Judiciaire Militaire, art 1 available at <http://www.leganet.cd/Legislation/Droit Judiciaire/Loi.023.2002.18.11.2002.pdf> (accessed 16 March 2017).

<sup>1440</sup> Under article 156 of the DRC Constitution, military courts have jurisdiction over members of the armed forces and national police. However, article 115 of the Military Justice Code 2002 extends the military courts' jurisdiction to include civilians who are involved in fighting during armed conflicts. Also article 112(7) of the Military Justice Code 2002 extends the military courts' jurisdiction during peacetime to any civilian 'who, even if not part of the army commit an infractions against the army, national police or the national service' and 'who without being soldiers commit crimes using weapons of war'. International Center for Transitional Justice 'The accountability landscape in eastern DRC: Analysis of the national legislative and judicial response to international crimes' (2009 – 2014) at 9 available at <https://www.ictj.org/publication/accountability-landscape-eastern-drc-analysis-national-legislative-and-judicial-response> (accessed 16 March 2017).

<sup>1441</sup> Loi n° 024/2002 du 18 novembre 2002 art 207 which provides that 'subject to the provisions of articles 117 and 119 of the Military Judicial Code, only the military courts and tribunals have jurisdiction over offences under this Code.'

<sup>1442</sup> *Idem* art 161, which provides military courts with exclusive jurisdiction over the crimes of genocide, crimes against humanity, and war crimes. The French version reads 'en cas d'indivisibilité ou de connexité d'infractions avec des crimes de génocide, des crimes de guerre ou des crimes contre l'humanité, les juridictions militaires sont seules compétentes'. The provisions relating to the crime of genocide is contained in article 164, crimes against humanity in articles 165 to 172 and war crimes in articles 173 to 175.

<sup>1443</sup> Michael P Broache 'Bringing home Rome: Explaining the domestication of the Rome Statute in the International Criminal Court' (2010) 1 at 21 available at [www.ssm.com/abstract=2659195](http://www.ssm.com/abstract=2659195) (accessed 16 March 2017).

comparable gravity’ as crimes against humanity.<sup>1444</sup> However, the Military Penal Code has been criticised by scholars as being deficient, for example, in that the definitions of genocide, crimes against humanity and war crimes were not fully in line with the Rome Statute’s definition; it conflated the crimes against humanity and war crimes definitions and no provision was made for the criminal liability based on command responsibility.<sup>1445</sup> Crimes against humanity are defined under the Military Penal Code as ‘grave violations of international humanitarian law committed against civilian populations before or during war’ and ‘are not necessarily related to a state of war’.<sup>1446</sup> It then provides a different definition of crimes against humanity in the subsequent article as ‘grave breaches against persons and objects protected by the Geneva Conventions and the additional Protocols, when the conventions only address situations of international and non-international armed conflict’.<sup>1447</sup> In April 2013, the Law on the Organisation, Functioning and Jurisdiction of the Courts was adopted to curb these deficiencies,<sup>1448</sup> taking away the exclusive right of the military courts to try crimes of genocide, war crimes and crimes against humanity by giving civilian courts, through the Court of Appeal, the right to try these crimes.<sup>1449</sup> So far, these courts have tried only one case, in which the Appellate Court of Lubumbashi convicted four defendants for genocide in September 2016.<sup>1450</sup>

### 6.3.3 Mobile Courts

States in Africa such as the DRC, Somalia and Sierra Leone have resorted to using mobile courts to improve ‘justice service delivery in remote, conflict-affected areas’,<sup>1451</sup> thus making justice accessible primarily to victims of SGBCs. The military courts in the eastern DRC, for instance,

<sup>1444</sup> Loi N° 024/2002 du 18 novembre 2002, art 169(7).

<sup>1445</sup> Broache ‘Bringing home Rome’ at 21 and 24. International Center for Transitional Justice ‘The accountability landscape in eastern DRC’ at 6 and 7.

<sup>1446</sup> Loi N° 024/2002 du 18 novembre 2002, art 165. ICTJ ‘The accountability landscape in eastern DRC’.

<sup>1447</sup> *Ibid. Ibid.*

<sup>1448</sup> Loi organique n°13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire available at <http://www.leganet.cd/Legislation/Droit%20Judiciaire/LOI.13.011.11.04.2013.htm> (accessed 16 March 2017).

<sup>1449</sup> Loi organique n°13/011-B du 11 avril 2013, art 91. The French version reads ‘les Cours d'appel connaissent de l'appel des jugements rendus en premier ressort par les tribunaux de grande instance et les tribunaux de commerce. Elles connaissent également, au premier degré :

1) du crime de génocide, des crimes de guerre et des crimes contre l'humanité commis par les personnes relevant de leur compétence et de celle des tribunaux de grande l'instance ;’

<sup>1450</sup> Human Rights Watch ‘Justice on trial: Lessons from the Minova rape case in the Democratic Republic of Congo (October 2015) at 71 available at [www.refworld.org/docid/560d06c34.html](http://www.refworld.org/docid/560d06c34.html) (accessed 12 April 2017).

<sup>1451</sup> Evaluation of UNDP’s support to mobile courts in Sierra Leone, Democratic Republic of Congo and Somalia at 4 available at [www.undp.org/.../undp/.../evaluation-of-undp-s-support-to-mobile-courts-in-drc--sier...](http://www.undp.org/.../undp/.../evaluation-of-undp-s-support-to-mobile-courts-in-drc--sier...) (accessed 19 September 2018).

cannot cover the vast expanse of that area as most courts are situated in towns and cities.<sup>1452</sup> In South Kivu, only four military courts are competent to try rape cases.<sup>1453</sup> This means that victims in rural areas have to travel long distances on unsafe roads to reach a military court, which could result in them not attending a hearing, not contributing to investigations and not participating in trials.<sup>1454</sup> Furthermore the cost of having to travel to and attend these courts is mostly prohibitive. Thus, victims in rural areas are usually forced to resort to traditional justice mechanisms or local custom, conducted in their local dialect rather than in French which is the language used by the military courts. A disadvantage of this form of justice is that the fine or reparation demanded of the perpetrator is usually paid in the form of a cow, or goat, often to the family of the victim.<sup>1455</sup> In other instances, the victim is forced to marry the perpetrator, which is a further form of punishment for the victim who has already been raped by the perpetrator, and sometimes may be forced to live a life of abuse at the hand of the perpetrator.<sup>1456</sup> This form of justice also undermines the rule of law, as it does not recognise the gravity of the criminal offence committed by the perpetrator.<sup>1457</sup> It also fosters corruption among police officers', who would rather receive money for helping to facilitate negotiations than encourage a victim to proceed with a court trial.

Since 2008, the American Bar Association Rule of Law Initiative (ABA ROLI) together with organisations, such as, MONUSCO and Avocats sans Frontières, have organised rape trials in remote areas of South Kivu, North Kivu and Maniema provinces in eastern DRC.<sup>1458</sup> In particular, the 'Task Force International Justice', a network of various organisations which have recently instituted mobile military courts and the Haute Cour Militaire to sit in remote areas. Congolese lawyers have also benefited from the legal training, received, on the implemented

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<sup>1452</sup> FIDH 'Victims of sexual violence rarely obtain justice and never receive reparation' at 47 available at [https://www.fidh.org/IMG/pdf/rapport\\_rdc.pdf](https://www.fidh.org/IMG/pdf/rapport_rdc.pdf) (accessed 19 September 2018).

<sup>1453</sup> Trial International 'Sexual violence in the DRC: Why is impunity so persistent?' (12 October 2017) available at <https://trialinternational.org/.../sexual-violence-in-the-drc-why-is-impunity-so-persista..> (accessed 19 September 2018).

<sup>1454</sup> FIDH 'Victims of sexual violence rarely obtain justice and never receive reparation' at 47.

<sup>1455</sup> PHR 'Barriers to justice: Implementing reparations for sexual violence in the DRC' (2013) at 20 available at <http://physiciansforhumanrights.org/blog/barriers-to-justice-for-barriers-to-justice-for-survivors-of-sexual-violence-in-the-drc.html> (accessed 19 September 2018).

<sup>1456</sup> *Ibid.*

<sup>1457</sup> *Ibid.*

<sup>1458</sup> Michael Maye 'Mobile courts in the Democratic Republic of Congo: Complementarity in action?' available at [https://worldjusticeproject.org/.../mobile\\_courts\\_in\\_the\\_democratic\\_republic\\_of\\_cong...](https://worldjusticeproject.org/.../mobile_courts_in_the_democratic_republic_of_cong...) (accessed 19 October 2018).

Rome Statute in the DRC's domestic law.<sup>1459</sup> Although these mobile courts have been successful in getting convictions for rape, operating these mobile courts is difficult and costly, and dependent on international funding.<sup>1460</sup>

#### **6.3.4 Military courts applying the Rome Statute's provisions before the implementation of the Rome Statute in its domestic law.**

As the DRC operates a monist legal system, international treaties and agreements which have been duly ratified do not have to be passed into law in order to be applied at the national level, as the DRC's Constitution provides for the supremacy of these 'international treaties and agreements over its national laws'.<sup>1461</sup> Taking advantage of these constitutional provisions, the military courts in 2006 started applying the provisions of the Rome Statute to certain cases in order to fill the inconsistencies and/or gaps in the DRC's domestic law,<sup>1462</sup> such as in the war crimes and crimes against humanity definition in the Military Penal Code, which differed from the Rome Statute's.<sup>1463</sup> The military courts applied the Rome Statute's provisions to rape cases, such as in the *Sango Mboyo* case in December 2003, in *Fizi* on New Year's Day in 2011 and in *Minova* in 2012.<sup>1464</sup> In the *Sango Mboyo* case, for example, by applying the provisions of the Rome Statute, the military judges applied 'a broader interpretation to the definition of rape than that provided for under Congolese law'.<sup>1465</sup> Although these cases recorded convictions, the

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<sup>1459</sup> Kavumu Case: Appeal opens near crimes venue available at <https://trialinternational.org/latest-post/kavumu-case-appeal-close-to-crimes-venue/> (accessed 19 October 2018).

<sup>1460</sup> Trial International 'Sexual violence in the DRC: Why is impunity so persistent?'

<sup>1461</sup> *Ibid*, Constitution of the Republic of the Democratic Republic of Congo amended by Law No 11/002, arts 153 and 215. Complementarity in the Congo: The direct application of the Rome Statute in the military courts of the Democratic Republic of Congo available at [www.domac.is/media/domac-skjol/Domac-12-Trapani.pdf](http://www.domac.is/media/domac-skjol/Domac-12-Trapani.pdf) (accessed 10 October 2016). Article 153 provides that 'the courts and tribunals, both civil and military, shall apply duly ratified international treaties, laws and with custom, provided this is not contrary to public order or good morals...' ('Les Cours et Tribunaux, civils et militaires, appliquent les traités internationaux dûment ratifiés, les lois, les actes réglementaires pour autant qu'ils soient conformes aux lois ainsi que la coutume pour autant que celle-ci ne soit pas contraire à l'ordre public ou aux bonnes mœurs'). Article 215 provides that 'duly concluded international treaties and agreements shall have, following publication, higher authority than laws, provided each treaty or agreement is applied by the other party.' ('Les traités et accords internationaux régulièrement conclus ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque traité ou accord, de son application par l'autre partie').

<sup>1462</sup> *Idem* at 5 and 17.

<sup>1463</sup> Article 166 of the Congolese Military Penal Codes definition of crimes against humanity includes quite a number of offences, which are classified as war crimes in the Rome Statute. For a fully explanation of these differences see *Idem* at 17, 18 and 21 – 33.

<sup>1464</sup> *Idem* at 106 and 110-112 giving a detailed summary of how the military courts applied the Rome Statutes provisions to these cases from those of the Military Penal Code.

<sup>1465</sup> *Idem* at 39. The *Kolonga* case is an example, where the military judges did not apply the Rome Statutes provisions. In this case, the military judges applied the Military Penal Codes definition of crimes against humanity

application of the Rome Statute's provisions by the military judges has been criticised for not providing 'clear criteria to explain their decision to use domestic law over international law, and vice versa'.<sup>1466</sup> The deficit in applying appropriate criteria was probably due to the judges' inexperience in applying treaty law such as the Rome Statute.<sup>1467</sup> In any event there is an inherent conflict between the application of international criminal law and the DRC's national laws.<sup>1468</sup>

#### **6.4 THE ROME STATUTE IMPLEMENTED IN THE DOMESTIC LAWS OF THE DEMOCRATIC REPUBLIC OF CONGO**

The DRC President's promulgation of Law No. 15/022 of 31 December 2015, Law No. 15/023 of 31 December 2015 and Law No. 15/024 of 31 December 2015, which had the effect of implementing the Rome Statute into the DRC's domestic law, modified and completed the Congolese Penal Code, Military Penal Code and Code of Criminal Procedure.<sup>1469</sup> These laws recognised that the Rome Statute 'embodies the repression of crimes that deeply shock the conscience of humanity and affect the entire international community as a whole, given their gravity'.<sup>1470</sup> The first relates to modifications of the Congolese Criminal Code;<sup>1471</sup> the second modifies the Military Penal Code, whilst the third law modifies the Code of Criminal Procedure.<sup>1472</sup> These laws, which were published in the Official Journal of the Democratic Republic of Congo on 29 February 2016, came into force 30 days after their publication. This meant that SGBCs which occurred before the date when these Acts came into force would not be prosecuted under these Acts, unless the prosecution was by the ICC. This created an impunity gap in prosecuting these crimes under to the Rome Statute. Laws No. 15/022 of 31 December 2015 and 15/024 of 31 December 2015 refer to the complementary principle under the Rome

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when sentencing to death a Mai-Mai combatant who ordered and participated in 10 women being abducted and raped.

<sup>1466</sup> International Center for Transitional Justice 'The accountability landscape in eastern DRC' at 7.

<sup>1467</sup> Open Society Foundations 'Putting complementarity into practice: Domestic justice for international crimes in DRC, Uganda and Kenya at 20 (2011) available at <https://www.opensocietyfoundations.org/.../putting-complementarity-into-practice-20> (accessed on 7 April 2017).

<sup>1468</sup> Dunia P Zongwe 'Taking leaves out of the International Criminal Court Statute: The direct application of international criminal law by military courts in the Democratic Republic of Congo' (2013) 46 *Israel Law Review* 249 at 250.

<sup>1469</sup> PGA 'PGA welcomes the enactment of the implementing legislation of the Rome Statute.'

<sup>1470</sup> Office Journal of the Democratic Republic of Congo.

<sup>1471</sup> Also referred to as the Criminal Code.

<sup>1472</sup> Office Journal of the Democratic Republic of Congo.

Statute, that is the obligation of state parties to try crimes within the ICC's jurisdiction, with the ICC being a court of last resort. Law No. 15/024 of 31 December 2015 provides that:

National courts have primacy of the crimes under Title IX of the Criminal Code concerning crimes against the peace and security of humanity. The International Criminal Court only intervenes in the alternative.<sup>1473</sup>

In its 'explanatory memorandum' Law No. 15/022 of 31 December 2015 provides that:

Since the jurisdiction of the Court is complementary to national criminal jurisdictions, state parties, including the Democratic Republic of Congo, have undertaken the following two obligations:

First to fully cooperate with the Court in its investigation and prosecution for crimes within its jurisdiction and  
Secondly to ensure the harmonisation of its criminal law with the provisions of the Statute.<sup>1474</sup>

To harmonise its criminal law with that of the Rome Statute, Law No. 15/022 of 31 December 2015 states that 'there is a necessity to introduce genocide crimes, crimes against humanity and war crimes into its Criminal Code Decree of 30 January 1940'.<sup>1475</sup> A flaw with the laws promulgated by the DRC's President lies in the poor drafting, as they do not specify whether types of jurisdiction other than territorial jurisdiction will apply before the DRC's domestic courts. What Law No. 15/024 of 31 December 2015 provides is that the Act 'implies a duty to submit to its criminal jurisdiction those responsible for the international crimes defined in the Rome Statute. . .'.<sup>1476</sup> The interpretation embraced all other types of jurisdiction, that is, active, personal, passive and universal jurisdiction when an accused, regardless of where s/he committed the crimes within the ICC's jurisdiction, is present in the DRC. If this is the case, a distinction can be made with the DRC's jurisdiction from other African states such as Burkina Faso and South Africa, which have implemented the Rome Statute in their domestic laws.<sup>1477</sup> Burkina Faso for instance, applies the universal jurisdiction principle by stating that 'its jurisdictions are

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<sup>1473</sup> Loi n° 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 06 août 1959 portant Code de procédure pénale, art 21 octies. The French version reads 'Les juridictions nationales ont la primauté pour connaître des crimes prévus par le titre IX du Code pénal, relatif aux crimes contre la paix et la sécurité de l'humanité. La Cour pénale internationale n'intervient qu'à titre subsidiaire.'

<sup>1474</sup> Loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code penal, explanatory memorandum.

<sup>1475</sup> *Ibid.*

<sup>1476</sup> Loi n° 15/024 du 31 décembre 2015. The text reads in French 'Cet acte implique, d'une part, le devoir de soumettre à sa juridiction criminelle les responsables des crimes internationaux définis dans le Statut de Rome ....'

<sup>1477</sup> Burkina Faso ratified the Rome Statute on 16 April 2004, whilst South Africa ratified the Rome Statute on 27 September 2000 after signing the Rome Statute on 17 July 1988.



competent to deal with crimes covered by this Act, regardless of where they were committed, the nationality of their perpetrator or that of the victim, when the accused is present in the national territory.’<sup>1478</sup>

South African courts have jurisdiction over non-nationals who committed crimes within the ICC’s jurisdiction outside their state boundaries, but where the perpetrator is present in their territory.<sup>1479</sup>

#### **6.4.1 The sexual and gender-based crimes implemented in the Democratic Republic of Congo’s domestic law**

Law No. 15/022 of 31 December 2015, which modifies and supplements Decree of 30 January 1940 of the Penal Code, defines the crimes of genocide, crimes against humanity and war crimes in terms similar to that of the Rome Statute,<sup>1480</sup> thus updating its domestic law to include international crimes as defined in the Rome Statute. As previously mentioned, these crimes were solely within the military courts’ jurisdiction and were not defined as in the Rome Statute. Law No. 15/024 of 31 December 2015 repeals the provisions on genocide, crimes against humanity and war crimes contained in Title V of the Military Penal Code 2002.<sup>1481</sup> Law No. 15/024 also repeals article 207 of the Military Penal Code 2002 which provided military courts with exclusive jurisdiction over these crimes.<sup>1482</sup> Only natural persons are criminally liable for these

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<sup>1478</sup> The Burkina Faso text in French reads ‘Les juridictions burkinabe sont competentes pour connaitre des crimes visés par la presente loi, independamment du lieu ou ceux-ci auront ete commis, de la nationalite de leur auteur ou de la victim, lorsque la personne poursuivie est presente sur le territoire national.’ Decree no 2009-894/Pres promulguant la Loi no 052-2009/AN, portant determination des competences et de la procedure de mise en oeuvre du statu de Rome relatif a la Cour penal internationale par les juridictions Burkinabe, art 15.

<sup>1479</sup> The South African text reads that: In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection ( I ) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if

- (a) that person is a South African citizen: or
- (b) that person is not a South African citizen but is ordinarily resident in the Republic: or
- (c) that person, after the commission of the crime, is present in the territory of the Republic: or
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic. Republic of South Africa, No. 27 of 2002: Implementation of the Rome Statute of the International Criminal Court Act, 2002, art 4(3).

<sup>1480</sup> Loi n° 15/022 du 31 décembre 2015 under article 4, Title IX which is titled “Crimes against the peace and security of humanity’. The text for the crime of genocide is under article 221, crimes against humanity under article 222 and war crimes under article 223. These articles are inserted in Book II of the Congolese Criminal Code.

<sup>1481</sup> See section titled ‘exposé des motifs’.

<sup>1482</sup> *Ibid.*



crimes, thus excluding companies and/or cooperatives from criminal liability.<sup>1483</sup> In addition, an accused must be 18 years of age when s/he committed the crime with which s/he is accused.<sup>1484</sup>

As with other crimes, SGBCs ‘committed with the intention to destroy in whole or in part a national, racial, religious or ethnic group’ would be considered a crime of genocide. As genocidal crimes, the SGBCs were classified as follows:

- The members of the group were murdered.
- There had been a serious injury to the physical or mental integrity of members of the group;
- Deliberate infliction on the group’s conditions of life calculated to bring about physical destruction;
- Measures to prevent births within the group; and
- Forcible transfer of children of the group to another group.<sup>1485</sup>

The definition of crimes against humanity is in line with that of the Rome Statute, in that such crimes must have been committed ‘as part of a widespread or systematic attack against any civilian population and with knowledge of the attack’,<sup>1486</sup> thus avoiding the confusion in its application, which was the case under the Military Penal Code. Under the Military Penal Code, the commission of grievous crimes was taken to be ‘serious violations of international humanitarian law committed against any civilian population before or during war’.<sup>1487</sup> The Military Penal Code further stated that ‘crimes against humanity were not necessarily related to the state of war’.<sup>1488</sup> This definition made crimes against humanity by the military courts difficult to apply, as international humanitarian law applies during an armed conflict whereas crimes against humanity may not necessarily occur during an armed conflict.<sup>1489</sup> The crimes of ‘rape, sexual slavery, enforced prostitution, forced sterilisation’, enslavement, imprisonment, torture and forced pregnancy are crimes of SGBV included in the list of crimes which constituted crimes against humanity.<sup>1490</sup>

Law No. 15/022 of 31 December 2015 also recognises war crimes committed in an international armed conflict or non-international armed conflict situation. Whilst article 8(1) of

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<sup>1483</sup> Loi n° 15/022 du 31 décembre 2015, art 20bis.

<sup>1484</sup> *Idem* art 20 ter.

<sup>1485</sup> *Idem* art 221.

<sup>1486</sup> *Idem* art 222.

<sup>1487</sup> Military Penal Code, art 165.

<sup>1488</sup> *Ibid.*

Avocats Sans Frontières ‘The application of the Rome Statute of the International Criminal Court’ at 23.

<sup>1490</sup> Loi n° 15/022 du 31 décembre 2015, art 222.

the Rome Statute provides for the ICC to have jurisdiction over war crimes committed ‘as part of a plan or policy or as part of a large-scale commission’, such provision is not required under Law No. 15/022. Since this is not a requirement for war crimes before the DRC courts, it may be easier to convict a perpetrator for SGBCs before these courts, than before the ICC.

Certain acts of SGBCs classified as war crimes are:

- Torture or inhuman, cruel or degrading treatment, including biological experiments;
- Wilfully causing great suffering or serious injury to body integrity, mental or general well-being;
- Subjecting persons of fallen enemies in its power to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental treatment or hospitalisation, nor carried out in interest of these people, and which cause death to or seriously endanger their health;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, as provided in article 222, paragraph 1, sub-paragraph 7 of this Penal Code on crimes against humanity;
- Enforced sterilisation, or any other form of injury or sexual violence constituting a grave breach of the Geneva Conventions.<sup>1491</sup>

Under article 224 of Law No. 15/022 of 31 December 2015:

The articles of Title IX of this Code shall be interpreted and applied in accordance with the Elements of the Crimes provided for in article 9 of the Rome Statute and adopted by the Assembly of state parties on 9 September 2002.<sup>1492</sup>

Thus, since the ICC relies on its Elements of Crimes for the interpretation and application of the law relating to genocide, crimes against humanity and war crimes, Law No. 15/022 of 31 December 2015 also directs that the DRC’s national courts to refer to the ICC’s Elements of Crimes to interpret or apply the law relating to these crimes. In the *Kavumu* case, mentioned below, the military court applied the ICC’s Elements of Crimes when considering the elements for rape.

Article 21 bis, like article 25 of the Rome Statute, provides for individual criminal responsibility. Under article 21(1) bis for example, a person is criminally liable where that person commits genocide, crimes against humanity and/or war crimes ‘individually, jointly with another person or through another individual irrespective of whether the individual is criminally

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<sup>1491</sup> Loi n° 15/022 du 31 décembre 2015, art 223.

<sup>1492</sup> *Idem* art 224.

responsible or not'.<sup>1493</sup> Law No. 15/022 of 31 December 2015 does not provide the same penalties as the Rome Statute for these crimes; whilst the Rome Statute provides for imprisonment and a fine, as well as forfeiture of a convicted person's proceeds, property and assets, Law No. 15/022 of 31 December 2015 provides that the crime of genocide, crimes against humanity and war crimes are punishable by death.<sup>1494</sup> The reason these crimes attract a death sentence may be because the DRC considers them to be as serious as certain other crimes in its domestic law, such as treason and espionage, attacks and plots against the head of state as well as participation in armed gangs, which also carry a death sentence.<sup>1495</sup>

Law No. 15/022 of 31 December 2015 also provides that the crime of genocide, crimes against humanity and war crimes, which it refers to as 'crimes against the peace and security of humanity', are not subject to statutory limitations, amnesty or pardon.<sup>1496</sup> Political considerations around the granting of statutory limitations, amnesty or pardon to members of armed groups who committed SGBCs in armed conflict situations and other serious crimes, were among the reasons for the low number of investigations and judicial proceedings relating to SGBV crimes against them at the ICC and before the DRC's military courts.<sup>1497</sup> During the period January 2014 to March 2016, for example, the United Nations Joint Human Rights Office (UNJHRO) documented only 28 convictions of rape and other offences committed by armed combatant groups.<sup>1498</sup> These armed combatant groups, allegedly responsible for a number of the SGBCs committed against civilians, were often beneficiaries of amnesty or integrated into the *Forces Armées de la République Démocratique du Congo* (FARDC).<sup>1499</sup> Knowing that they would not be prosecuted but would be granted amnesty or integrated by the DRC government into the DRC's national armed forces (FARDC), the perpetrators of crimes relating to SGBV were not deterred from committing these crimes. Also at the international level, the DRC government was reluctant to assist the ICC with the arrest of members of armed combatant groups once it thought

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<sup>1493</sup> *Idem* art 21(1)bis.

<sup>1494</sup> *Idem* arts 221, 222 and 223. Rome Statute, art 77.

<sup>1495</sup> Code Penal Congolais Décret du 30 janvier 1940 tel que modifié et complété à ce jour Mis à jour au 30 novembre 2004, arts 181- 186 (treason and espionage), arts 193 -194 (attacks and plots against the Head of State) and art 202 (participation in armed gangs).

<sup>1496</sup> Loi n° 15/022 du 31 décembre 2015, art 34a.

<sup>1497</sup> Other reasons for low numbers of investigations and judicial proceedings include access to the scene of the crime, the capacity to investigate and prosecute these crimes and also availability of legal aid for victims and witnesses. OHCHR 'Accountability for human rights violations and abuses in the DRC: Achievements, challenges and way forward' (January 2014 - March 2016) para 52.

<sup>1498</sup> *Idem* para 9.

<sup>1499</sup> *Idem* paras 47 and 94.

that it could enter into peace deals with these groups, although the government did self-refer certain cases to the ICC. The case brought against Bosco Ntaganda by the ICC is an example of such a situation, where the DRC government initially refused to assist in Ntaganda's arrest, stating that his arrest 'would further exacerbate tensions in the east and constitute an obstacle to any peace deal'.<sup>1500</sup>

#### **6.4.2 Immunity based on official capacity**

Article 20 quater of Law No. 15/022 of 31 December 2015 removes immunity of certain classes of people to which the DRC Constitution grants immunity. It provides that:

Regarding the prosecution for the crimes referred to in Title IX on crimes against the peace and security of humanity, the law applies to everyone equally without any distinction based on official capacity. In particular, official capacity as Head of State or Government, a member of the Government, a member of Parliament or elected representative or public official of the state, does not exonerate that person from criminal responsibility, neither does it constitute a ground for reduction of sentence.<sup>1501</sup>

The article is similar to article 27 of the Rome Statute which provides that officials such as a head of state or government and members of government are not be immune from the prosecution of crimes within the jurisdiction of the ICC.

In its explanatory memorandum, Law No. 15/022 of 31 December 2015 also states that statutory limitations will not apply to crimes of genocide, crimes against humanity and war crimes 'irrespective of the official capacity, under which certain categories of people are beneficiaries of immunities under domestic law'.<sup>1502</sup> Articles 153 and 163 of the DRC's Constitution specify those classes of people who would benefit from immunity under the DRC's domestic law. Under article 153, the prosecution of certain public officers should be before the Court of Cassation 'in the first and last resort on the infractions' committed by them. These public officers are the:

1. Members of the National Assembly and the Senate;
2. Members of the Government other than the Prime Minister;
3. Members of the Constitutional Court;

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<sup>1500</sup> *Idem* para 52. OHCHR 'Progress and obstacles in the fight against impunity' at para 44.

<sup>1501</sup> Loi n° 15/022 du 31 décembre 2015, art 20 quater.

<sup>1502</sup> *Idem* explanatory memorandum. See also article 34bis which states that 'the crimes and punishments under Title IX on crimes against the peace and security of humanity are not subject to statutory limitations. They are also not subject for pardon or immunity'.

4. Magistrates of the Court of Cassation and the members of the prosecutorial office before that Court;
5. Members of the Council of State and the members of the prosecutorial office before that Council;
6. Members of the Court of Accounts and the members of the prosecutorial office before that Office;
7. First Presidents of the Courts of Appeal as well as the Attorneys General at these courts;
8. First Presidents of the Administrative Courts of Appeal and the Attorneys General at these courts;
9. Governors, and Vice Governors of the Province and the Provincial Ministers.
10. Presidents of the Provincial Assemblies.<sup>1503</sup>

The DRC's Constitution also provides that the Constitutional Court is the only court before which the President, the Prime Minister, their 'co-authors' and accomplices can be tried for certain criminal offences.<sup>1504</sup> The listed offences are in article 164 of the DRC Constitution as 'political infractions of high treason, of contempt of Parliament, infringements of honour or of probity as well as crimes of privilege and for the other infractions of common law committed in the exercise or on the occasion of the exercise of their functions'.<sup>1505</sup> Crimes of SGBV can be classified as offences relating to 'infringements of honour or of probity'. Article 20 quater of Law No. 15/022 of 31 December 2015 thus removes the immunity granted to these classes of people relating to the crime of genocide, crimes against humanity and war crimes. In addition, article 20 quater provides that one's status does not constitute a ground for a reduction in sentence.

The DRC's Military Judicial Code provides for the prosecution of army generals before the High Military Court for crimes committed by them.<sup>1506</sup> However, the military judicial system has been reluctant to prosecute most high-ranking officials due to pressure from the DRC government and other top military officials. As a result, most of these high-ranking officials who were directly or indirectly responsible for SGBCs escaped investigation and prosecution for these crimes, especially as their juniors could not prosecute them before lower military courts.<sup>1507</sup> Since the promulgation of these laws, the military courts with the assistance of Trial International and other members of Task Force International Justice have successfully prosecuted Fredric Batumik, who was a Member of Parliament in South Kiv. He was convicted

<sup>1503</sup> Constitution of the Republic of the Democratic Republic of Congo amended by Law No 11/002, art 153.

<sup>1504</sup> *Idem* at arts 163 and 164.

<sup>1505</sup> *Idem* at art 164.

<sup>1506</sup> *Ibid.* Military Judicial Code, art 128.

<sup>1507</sup> *Idem* at 48.

with 10 others for the rape of 40 young girls in the village of Kavumu.<sup>1508</sup> His lawyers claimed that the proceedings against him were unconstitutional, as the Congolese Constitution granted him immunity as a Member of Parliament.<sup>1509</sup> The military court in a preliminary decision held that article 27 of the Rome Statute, which dealt with the ‘irrelevance of official capacity’, prevailed over the domestic immunities granted under the Congolese Constitution.<sup>1510</sup> It is necessary that the military courts and the Courts of Appeal be independent of the government and top military officers if these courts are to be effective in prosecuting SGBCs committed in armed conflicts as with other crimes. The UNSC has repeatedly emphasised the importance of fighting impunity for crimes against humanity and war crimes committed by the various ranking officers of FARDC and the PNC. It has also emphasised the need for the DRC government ‘to continue to ensure the increased professionalism of its security forces’.<sup>1511</sup> The military courts and the courts of appeal need to work together, by sharing experiences in challenging impunity, so that they overcome the political, institutional and legislative challenges faced by those branches of the judiciary.<sup>1512</sup>

### **6.4.3 Amending the Military Penal Code to conform to the Rome Statute**

#### **6.4.3.1 Law no. 15/023 of 31 December 2015 explanatory memorandum**

Law no. 15/023 of 31 December 2015 amends the Military Penal Code of Law No. 024/202 of 18 November 2002. Its explanatory memorandum states that:

The ratification by the Democratic Republic of Congo of the Rome Statute of the International Criminal Court and its entry into force justified, at the time, the amendment of Act No. 024/2002 of 18 November 2002 on the Military Penal Code by provisions defining and punishing the crime of genocide, crimes against humanity and war crime.<sup>1513</sup>

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<sup>1508</sup> See section below on ‘The application of the Rome Statute by the military courts after its implementation in the DRC’s laws’.

<sup>1509</sup> The Kavumu trial: Complementarity in action in the Democratic Republic of Congo available at <https://www.ijmonitor.org/2018/02/the-kavumu-trial-complementarity-in-action-in-the-democratic-republic-of-congo/> (accessed 20 September 2018). He claimed immunity under article 107 of the Congolese Constitution.

<sup>1510</sup> *Ibid.*

<sup>1511</sup> UNSC, Resolution 2277 (2016), 30 March 2016.

<sup>1512</sup> ICTJ ‘Magistrates discuss dual jurisdiction of military and civilian courts over international crimes in DRC’ (September 2015) available at <https://www.ictj.org/news/drc-magistrates-discuss-dual-jurisdiction-military-civilian-courts-international-crimes> (accessed on 28 June 2016).

<sup>1513</sup> Loi n° 15/023 du 31 décembre 2015 modifiant la Loi n° 024-2002 du 18 novembre 2002 portant Code Pénal militaire, explanatory memorandum.

The explanatory memorandum then goes on to state that crimes relating to peace and security of humanity are no longer within the exclusive jurisdiction of the military courts, thus giving ordinary courts jurisdiction over these crimes. The explanatory memorandum thus provides that:

Organic Law no. 13/011-B of 11 April 2013 on the Organisation, Functioning and Competence of judicial authorities, recognises the competence of the ordinary courts to deal with crimes affecting the peace and security of humanity. Having lost the character of an exclusively military offence, these international crimes are now counted among the ordinary offences.

The main innovations made to the current text are:

The abolition of Law no. 024/2002 of 18 November 2002 of the Military Penal Code of provisions relating to crimes affecting the peace and security of mankind;

The repeal of article 207 of the same law which recognised only military competence to deal with offences under the Military Penal Code.<sup>1514</sup>

This provision is reinforced by the repeal of article 207 of the Military Penal Code, meaning that the definition of the crime of genocide, crimes against the peace and war crimes as provided for in Law no. 024/2002 of 18 November 2002 of the Military Penal Code (which did not conform with that of the Rome Statute) no longer applied and that the military courts no longer had exclusive jurisdiction to try the crime of genocide, crimes against the peace and war crimes.

#### **6.4.3.2 Command responsibility of military commanders and non-military superiors**

Article 1 of Law no.15/023 of 31 December 2015 provides for the command responsibility of ‘military commanders or a person in effective function of a military commander’, by adopting the language of article 28(a) of the Rome Statute, relating to these persons’ liability for crimes within the court’s jurisdiction committed by their subordinates. Article 1 provides that:

In addition to other grounds of criminal responsibility under the Decree of 30 January 1940 on the Penal Code and this Act for the crime of genocide, crimes against humanity and war crimes, a military commander or a person in effective function of a military commander is criminally responsible for such crimes committed by forces under his or her effective command and control, or effective authority and control, as the case may be when he or she has not exercised appropriate control over such forces where:

- (a) That military commander or person knew or ought by reason of circumstances to have known that the forces were committing or were about to commit these crimes; and
- (b) This military commander or such person has failed to take all necessary and reasonable measures within his power to prevent or punish the execution thereof or to refer the matter to the competent authorities for the purposes of investigation and prosecution.

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<sup>1514</sup> *Ibid.*

In the case against Bemba Gambo, heard before the ICC, Trial Chamber III listed six requirements a court must fulfil to find a military commander liable for acts of his subordinate.<sup>1515</sup> These requirements are:

1. Crimes within the jurisdiction of the court must have been committed by forces;
2. The accused must have been either a military commander or a person effectively acting as a military commander;
3. The accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes;
4. The accused knew or, owing to the circumstances at the time should have known that the forces were committing or about to commit such crimes;
5. The accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and
6. The crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them.<sup>1516</sup>

The adoption by the DRC government of command responsibility of its military commanders is a move forward in the prosecution of these officials relating to SGBCs committed by them where they incite or order such crimes to be committed or fail to prevent or repress these crimes from happening. The prosecution of military commanders is a means for victims to obtain justice, especially when they cannot identify those who raped them, but can identify the armed group to which the perpetrator(s) belonged.

Before the enactment of article 1 in Law no. 15/023 of 31 December 2015, Congolese law did not provide for liability based on command responsibility. Although the DRC military courts have used the command responsibility principle to prosecute a few high ranking military officers, there is a general reluctance by the military courts to prosecute such officers.<sup>1517</sup> As

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<sup>1515</sup> *Prosecutor v Jean-Pierre Bemba Gambo* ‘Judgment pursuant to article 74 of the Statute’ (21 March 2016) ICC-01/05-01/08 at para 170.

<sup>1516</sup> *Ibid.*

<sup>1517</sup> Colonel Daniel Kibibi, General Jerome Kakwavu and Lieutenant-Colonel Bedi Mobuli Engangela (also known as ‘Colonel 106’) are examples of commanders who were convicted by the military courts. Colonel Kibibi who was a commanding officer was sentenced by a mobile court in February 2011 to 20 years imprisonment for crimes against humanity, which included rape. He had ordered an attack on the Fizi town in January 2011, which resulted in the rapes of at least 50 women and girls. General Kakwavu who was a leader of the *Forces armées du Peuple Congolais* (FAPC) and also FARDC was sentenced to 10 years imprisonment by a High Military Court in November 2014. He was found guilty of the war crimes of rape, murder and torture, which he and his troops committed in Ituri between 2003 and 2005. Lieutenant-Colonel Engangela was a FARDC commandant in the South



mentioned above, this is due to the interference of the powerful figures in the military and government establishments.<sup>1518</sup> The reluctance to prosecute these high-level military officers is evidenced in such cases as the Minova Rape Case where soldiers of the Congolese army raped at least 76 women and girls in November 2012. An international outcry put pressure on the DRC government to prosecute those responsible and the military initiated a trial in Goma. Most of the victims could not identify those who had raped them. Although the military court applied the principles of command responsibility as provided for under the Rome Statute, only two soldiers of the Congolese army of the 39 accused were convicted of rape.<sup>1519</sup> As stated by Human Rights Watch ‘[t]he high-level commanders with overall responsibility for the troops in Minova were never charged; those lower-ranking officers who were charged were all acquitted. A number of soldiers were convicted of the war crime of pillage, despite an obvious lack of evidence against them’.<sup>1520</sup> However, the conviction of a FARDC commander in South Kivu in the Musenyi case, indicates greater zeal on the part of military courts in prosecuting perpetrators in commanding positions.<sup>1521</sup>

Military commanders of FARDC also signed a declaration in March 2015 to combat rape committed in armed conflicts. The signed declaration by the military commanders relates to their command responsibility, and includes:

[R]especting human rights and international humanitarian law in relation to sexual violence in conflict; taking action against sexual violence committed by soldiers under their command; ensuring prosecution of alleged perpetrators of sexual violence under their command; facilitating access to areas under their command to military prosecutors and handing over perpetrators within their command that are under investigation, have been indicted or convicted; undertaking disciplinary measures against soldiers suspected of involvement in sexual violence in line with the FARDC military code; reporting to the FARDC leadership any incidents or allegations committed within their area of responsibility; sensitizing soldiers under their command about the zero tolerance policy on sexual violence in conflict; and taking specific measures to ensure

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Kiva province. He was convicted to a term of 10 years imprisonment and life imprisonment by a military court of South Kivu in December 2014 for crimes against humanity, which included rape and sexual slavery. OHCHR ‘Accountability for Human Rights Violations and Abuses in the DRC’ at paras 81 and 82. Human Rights Watch ‘Justice on trial’ at 75 and 89.

<sup>1518</sup> Human Rights Watch ‘Justice on trial’ at 48 and 75.

<sup>1519</sup> *Idem* at 3.

<sup>1520</sup> Even a military police battalion officer who was charged was acquitted, as the prosecution did not present evidence that those soldiers who were under his command committed the crimes, which occurred in Minova. *Idem* at 2 and 38.

<sup>1521</sup> See below regarding the facts in the Musenyi Case.

protection of victims, witnesses, judicial actors and other stakeholders involved in addressing sexual violence.<sup>1522</sup>

As of late 2016, only 35 commanders of FARDCs military units had signed this declaration.<sup>1523</sup>

Just as military superiors are not exempt from command responsibility, civilian superiors are not exempt from superior responsibility relating to crimes of genocide, crimes against humanity and war crimes committed by their subordinates. In line with article 28(b) of the Rome Statute, article 22 bis of Law no. 15/022 of 31 December 2015 provides that:

1. Regarding the relationship between non-military superiors and their subordinates, the superior shall be criminally responsible for crimes under articles 221 to 223 of this Penal Code for crimes committed by subordinates under his or her effective authority and control, when he did not exercise control properly over such subordinates, in situations where:
  - the superior knew that the subordinates were committing or about to commit such crimes; or
  - has deliberately disregarded information which clearly indicated the plan to commit such crimes or the commission of the crime.
2. These crimes were related to activities under the superior's responsibility and effective control.
3. The superior failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the crime or to refer the matter to the competent authorities for investigation and prosecution.

The liability of these civilian superiors is the same as that of military commanders.

#### **6.4.4 Cooperation and judicial assistance of the Democratic Republic of Congo with the International Criminal Court**

Law no. 15/024 of 31 December 2015 amended and supplemented the Decree of 06 August 1959 on the Code of Criminal Procedure. It provides for cooperation with and judicial assistance for the ICC by the DRC, as provided by Part 9 of the ICC's Rome Statute. The explanatory memorandum of Law no. 15/024 of 31 December 2015 provides that:

This Act implies a duty to submit to its criminal jurisdiction those responsible for the international crimes defined in the Rome Statute and, on the other hand, the obligation to cooperate fully with the International Criminal Court.<sup>1524</sup>

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<sup>1522</sup> United Nations Office of the Special Representation of the Secretary-General for Sexual Violence in Conflict 'DRC: Military pledge marks milestone on road to ending conflict related sexual violence (March 2015) available at [www.un.org/sexualviolenceinconflict/.../drc-military-pledge-marks-milestone-on-road](http://www.un.org/sexualviolenceinconflict/.../drc-military-pledge-marks-milestone-on-road) (accessed on 23 April 2017).

<sup>1523</sup> OHCHR 'Accountability for human rights violations and abuses in the DRC' at para 88.

<sup>1524</sup> Loi n° 15/024 du 31 décembre 2015, explanatory memorandum.

Law no. 15/024 of 31 December 2015, which includes a section III bis to the amended Code of Criminal Procedure, states ‘the terms and conditions for cooperation between the Democratic Republic of the Congo and the International Criminal Court’.<sup>1525</sup> This section titled ‘[c]ooperation with the International Criminal Court’, provides for the DRC’s full cooperation with the ICC ‘in the investigation and prosecution of crimes under its [ICC’s] jurisdiction under the conditions and according to the procedure laid down in this chapter and by other national provisions and by the Statute of the Court’.<sup>1526</sup> Cooperation with and assistance for the ICC by the DRC, or any state member of the ICC, is essential as the ICC does not have its own international police force, and thereby needs to rely on state parties to assist it. The two South African judgments relating to President Al-Bashir of Sudan are instructive in holding that a state party should be judicially independent in making decisions relating to requests from the ICC where political issues are involved and to protect the rule of law.<sup>1527</sup> Both the North Gauteng High Court, in Pretoria, South Africa and the Supreme Court of Appeal gave sound judgments, which were not influenced by the political issues surrounding the case. The South African Litigation Centre brought the action before the High Court against the government of South Africa for an order for the arrest and surrender of Al-Bashir to the ICC, when he entered South Africa for an African Union summit in June 2015. The government argued that it was not obliged to arrest Al-Bashir as he enjoyed immunity from such arrest. As dealt with in chapter 5, the ICC issued two arrest warrants for Al-Bashir’s arrest which were forwarded to all state parties to the Rome Statute, including South Africa. The arrests have still to be executed. The High Court was not aware that Al-Bashir had already left South Africa when it held that the South African government’s action in not arresting Al-Bashir was inconsistent with the Constitution and ordered it to arrest Al-

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<sup>1525</sup> *Ibid.*

<sup>1526</sup> *Idem* arts 2 and 21 bis.

<sup>1527</sup> *Southern African Litigation Centre v Minister of Justice and Constitutional Development & Others* (27740/2015) [2015] ZAGPPHC 402; *Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre* (867/15) [2016] ZASCA17 (15 March 2016). Angela Mudukuti ‘Judicial integrity and independence: The South African Omar Al Bashir matter’ at 16 available at [www.southernafricalitigationcentre.org/wp-content/.../GOAL-16-Book-Mudukuti.pdf](http://www.southernafricalitigationcentre.org/wp-content/.../GOAL-16-Book-Mudukuti.pdf) (accessed 18 September 2018).

Bashir and detain him, pending a formal request from the ICC for his surrender.<sup>1528</sup> The government, however, successfully appealed against the High Court's decision.<sup>1529</sup>

The procedure for the ICC requesting the arrest and surrender of persons is provided for in article 21-14° of Law no. 15/024 of 31 December 2015. Requests issued by the ICC for the arrest and surrender of persons should be to the Attorney General concerned. Article 21-16° of Law no. 15/024 of 31 December 2015 sets forth the procedure that the Attorney General must follow in responding to a request for an arrest and surrender. The Attorney General must respond promptly to the request made by the ICC and, where he approves the request, s/he 'shall issue a warrant for arrest, investigate and order the arrest and detention of the person sought'. The article then provides that 'the person arrested by the Attorney-General at the Court of Appeal shall be brought before the Attorney-General at the Court of Cassation, within a maximum transfer period of thirty days'.<sup>1530</sup>

Law no. 15/024 of 31 December 2015 also provides the ICC and the ICC's staff with privileges and immunities when in the DRC, 'necessary for the performance of their duties within the limits and conditions laid down in article 48 of its Statute'.<sup>1531</sup> ICC staff entitled to privileges and immunities include ICC judges, the prosecutor and deputy prosecutor, the registrar, counsel, experts and witnesses.<sup>1532</sup> In its attempt to conform to article 88 of the Rome Statute, Law no. 15/024 of 31 December 2015 provides procedures for the different forms of cooperation specified under Part 9 of the Rome Statute.<sup>1533</sup> The Attorney General at the Court of Cassation is responsible for facilitating cooperation requests received from the ICC.<sup>1534</sup> In the case of the President, the Prime Minister, their co-authors and accomplices, the Prosecutor General is responsible for facilitating cooperation requests received from the ICC, relating to these persons.<sup>1535</sup>

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<sup>1528</sup> *Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre*, paras 4 - 7.

<sup>1529</sup> *Idem*.

<sup>1530</sup> *Idem* art 21-16°.

<sup>1531</sup> Loi n° 15/024 du 31 décembre 2015, art 21 bis. Rome Statute, art 48 which is titled 'Privileges and Immunities.'

<sup>1532</sup> Rome Statute, art 48.

<sup>1533</sup> Article 88 of the Rome Statute provides that 'state parties shall ensure that there are procedures available under their national law for all forms of cooperation which are specified under this Part,' that is, Part 9 of the Rome Statute.

<sup>1534</sup> Loi n° 15/024 du 31 décembre 2015, art 21 bis.

<sup>1535</sup> *Ibid*.

#### 6.4.5 Competing requests

Law no. 15/024 of 31 December 2015 provides for competing requests between the ICC and other states at the regional level, not provided for by the Malabo Protocol. Law no. 15/024 of 31 December 2015 provides that ‘in the case of competing requests, the competent Attorney General shall comply with the provisions of Article 90 of the Rome Statute’.<sup>1536</sup> The article provides for two situations: competing requests between the ICC and state parties, and between the ICC and non-state parties. With regard to competing requests between the ICC and a state party for the surrender to the ICC of ‘a person for the same conduct which forms the basis of the crime’, the ICC shall have priority over that state party’s request for the extradition of that person if:

- a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting state in respect of its request for extradition; or
- b) The Court makes the determination described in subparagraph (a) pursuant to the requested state's notification . . .<sup>1537</sup>

However where there is no determination made by the ICC, article 90 provides that:

The requested state may, at its discretion, pending the determination of the Court . . . proceed to deal with the request for extradition from the requesting state but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.<sup>1538</sup>

Article 90 repeats the same principle with regard to non-state parties to the ICC. Article 90(4) states that where the non-state party ‘is not under an international obligation to extradite the person to the requesting state’, that non-state party ‘shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible’.<sup>1539</sup> Where the above situation ‘has not been determined to be admissible by the Court, the requested state may, at its discretion, proceed to deal with the request for extradition from the requesting state’.<sup>1540</sup> However, where an international obligation is in existence, ‘the requested state shall determine

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<sup>1536</sup> *Idem* art 21 sixties

<sup>1537</sup> Rome Statute, arts 90(2)(a) and (b).

<sup>1538</sup> *Idem*, art 90(3).

<sup>1539</sup> *Idem*, art 90(4).

<sup>1540</sup> *Idem*, art 90(5).

whether to surrender the person to the Court or extradite the person to the requesting state'.<sup>1541</sup> In making its choice, the state is guided by the criteria listed in article 90(6) of the Rome Statute.

#### **6.4.6 The Democratic Republic of Congo applying the complementarity principle**

Article 21 octies of Law no. 15/024 of 31 December 2015 provides that the DRC's national courts shall have primacy over the ICC regarding crimes within the ICC's jurisdiction. This conforms with the ICC's Rome Statute which states in its preamble and article 1 that the ICC 'shall be complementary to national criminal jurisdictions'.<sup>1542</sup> Article 21 octies of Law no. 15/024 of 31 December 2015 also gives cognisance to the complementarity principle under article 17 of the Rome Statute by providing that the 'International Criminal Court only intervenes in the alternative'.<sup>1543</sup> Article 21 octies of Law no. 15/024 of 31 December 2015 further provides that 'when the International Criminal Court is seized, the Attorney General concerned may assert the jurisdiction of the national courts or, where appropriate, challenge the jurisdiction of the International Criminal Court.' Where the DRC challenges the ICC's jurisdiction, 'the competent Attorney General shall adjourn the execution of the application until the final decision by the Court is taken'.<sup>1544</sup>

Although there has been progress in the number of convictions of perpetrators of SGBV in the DRC, the number of convictions of state agents and members of armed groups who committed SGBV remains low.<sup>1545</sup> Even with the recent promulgation of the Rome Statute, the DRC faces challenges in its crucial fight to prevail over impunity. These challenges include the government's lack of political will to try senior officers as well as difficulties in ordering and empowering the DRC's army to reach volatile areas occupied by armed groups. Other problems include the vetting of the DRC's security forces, training investigators to obtain evidence relating to SGBV and interview victims of SGBV, training more lawyers and judges in prosecuting SGBCs and securing its penitentiary system to prevent the escape of prisoners.<sup>1546</sup> Although the Task Force for International Justice has assisted with these challenges, by training lawyers in prosecuting SGBCs, getting experts in child trauma to sit in on interviews of child victims and

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<sup>1541</sup> *Idem*, art 90(6).

<sup>1542</sup> *Idem*, preamble and article 1. Loi n° 15/024 du 31 décembre 2015, art 21 octies.

<sup>1543</sup> Rome Statute, art 17.

<sup>1544</sup> Loi n° 15/024 du 31 décembre 2015, art 21 nonies.

<sup>1545</sup> See the *Kavumu* case and the *Musenyi* case below.

<sup>1546</sup> *Ibid.* Open Society Foundations 'Putting complementary into practice' at 20.

successfully petitioning for the change of an official who refused to initiate an investigation, the government still needs to work more effectively in other areas.<sup>1547</sup> This can be done, for example, by creating safer roads to reach rural areas and creating more permanent courts, as mobile courts are expensive to organise.<sup>1548</sup> With the DRC's Courts of Appeal now having jurisdiction to try civilians rather than the military courts, both courts need to work together in the investigation and prosecution of SGBCs, especially as the ICC is unlikely to prosecute many situations from the DRC as its caseload increases. The ICC's OTP can also assist by encouraging the DRC to bring prosecutions of crimes within the ICC's jurisdiction before its domestic courts. This can be done through its positive complementarity principle which it defines as:

All activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.<sup>1549</sup>

Three categories of assistance that the OTP offers states under the positive complementarity principle are legislative assistance, technical assistance and capacity-building and improving physical infrastructure.<sup>1550</sup> Examples of useful technical assistance to the DRC's military and civil courts are 'training of police, investigators and prosecutors, capacity building with regard to protection of witnesses and victims, forensic expertise, training of judges and training of defence counsel, [and] security for and independence of officials'.<sup>1551</sup> Building capacity would include 'mutual legal assistance in criminal matters, to underpin cooperation in actual prosecutions',<sup>1552</sup> and assistance with physical infrastructure would include construction of 'court houses and prison facilities, and the sustainable operation of such institutions'. The ICC would also need to assist the DRC's civil and military courts in complying with internationally accepted standards in investigating and prosecuting cases relating to SGBV, as well as in the training required for the of the application of these standards.<sup>1553</sup> In its 2016-2018 Strategic Plan, the OTP has undertaken to encourage states in the investigation and prosecution of potential cases that fall within its

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<sup>1547</sup> The *Kavumu* trial: Complementarity in action in the Democratic Republic of Congo.

<sup>1548</sup> Though the President has appointed a special adviser to tackle sexual violence and child recruitment matters, these are issues, which the government needs to address for the prosecution of SGBCs.

<sup>1549</sup> ICC-ASP 'Report of the Bureau on stocktaking: Complementarity. Taking stock of the principle of complementarity: bridging the impunity gap.' (18 March 2010) at 4 available at [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/.../ICC-ASP-8-51-ENG.pdf](https://asp.icc-cpi.int/en_menus/asp/complementarity/.../ICC-ASP-8-51-ENG.pdf) (accessed 11 November 2016).

<sup>1550</sup> *Ibid.*

<sup>1551</sup> *Ibid.*

<sup>1552</sup> *Ibid.*

<sup>1553</sup> *Idem* at 5.

jurisdiction and are genuine.<sup>1554</sup> In 2014, when the ICC prosecutor Fatou Bensouda visited the DRC, she recognised the need to strengthen cooperation between the ICC and the DRC, as the ICC could not prosecute all the DRC's cases.<sup>1555</sup> She also stated that the ICC was willing to work with the DRC to end impunity in the DRC, and help in strengthening the DRC's judicial system.<sup>1556</sup> The OTP has stated that assisting states in the investigation and prosecution of cases will have no financial implications for the ICC, as the ICC was not a development agency.<sup>1557</sup> As pointed out by the OTP, there is the need for a collective effort to prevent crimes within its jurisdiction.<sup>1558</sup> Organisations such as the UN together with partners like the American Bar Association Rule of Law Initiative have a role to play in the prosecution of crimes through mobile gender courts.<sup>1559</sup>

Law no. 15/024 of 31 December 2015 also provides for self-referrals of situations to the ICC by the DRC's President, by a decision of the Council of Ministers.<sup>1560</sup>

#### **6.4.7 Enhancing the investigation and prosecution of sexual and gender-based crimes in the DRC**

The military courts applied the Rome Statute's provisions to certain cases to fill the inconsistencies and/or gaps in the DRC's domestic laws relating to international law. In spite of this, it is still necessary for courts to take cognisance of what the OTP has done to improve its investigation and prosecution of cases relating to SGBCs, and to learn from its mistakes made in cases such as the *Minova* rape case.

##### **6.4.7.1 The rights and protection of the accused, victims, witnesses and intermediaries**

The rights and protection of the accused, victims, witnesses and intermediaries are provided for under section VI of Law no. 15/024 of 31 December 2015. Article 26 bis provides for the right of an accused to a fair, impartial and public hearing. Article 26 ter provides for the protection of victims, witnesses and intermediaries. Before the implementation of article 26 ter of Law no.

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<sup>1554</sup> *Idem* at 20.

<sup>1555</sup> Radio Okapi 'Fatou Bensouda: Ensemble, nous pouvons mettre fin à l'impunité' (March 2014) available at <http://www.radiookapi.net/emissions-2/invite-du-jour/2014/03/14/fatou-bensouda-ensemble-nous-pouvons-mettre-fin-limpunite/> (accessed on 14 March 2017).

<sup>1556</sup> *Ibid.*

<sup>1557</sup> ICC-ASP 'Report of the Bureau on stocktaking: Complementarity' at 2.

<sup>1558</sup> ICC-OTP, Strategic Plan| 2016-2018 at 31.

<sup>1559</sup> Open Society Foundation 'Justice in DRC.' OHCHR 'Accountability for human rights violations and abuses in the DRC' at iii (where the United Nations Joint Human Right Office are committed to fight impunity in the DRC).

<sup>1560</sup> Loi n° 15/024 du 31 décembre 2015, art 21-10°.



15/024 of 31 December 2015 in the DRC's Criminal Procedure Code, no provision was made for the protection of victims, witnesses and intermediaries who testified, and the rights of the accused were not protected. Article 26 **ter** of Law no. 15/024 of 31 December 2015 states that:

In the context of the punishment of crimes under Title IX of the Criminal Code, the court seized shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and respect for the privacy of victims, witnesses and of intermediaries.<sup>1561</sup>

Article 26 **ter**, in part is similarly worded to article 68(1) of the Rome Statute, although it does not provide for the mechanisms to carry out these protective measures. The assumption is that, as the Rome Statute is part of the DRC's domestic laws that it would rely on the other provisions of article 68 of the Rome Statute, and the ICC's Policy Paper on Sexual and Gender-based Crimes for guidance. The latter, for instance provides that:

61. Potential victim-witnesses with respect to sexual and gender-based crimes shall be subject to preliminary psychosocial and security assessments and screenings. The psychosocial assessment is mandatory for all witnesses of sexual and gender-based crimes. It will be conducted by a psychosocial expert, who will consider the welfare of the witnesses, and their ability both to undergo an interview process and testify without undue personal or psychological harm. The expert may be present during the interview itself in order to monitor the interview and advise the interviewer. The expert or an accompanying person may also provide support to the witness, as requested.

62. The screening will focus on assessing the individual's personal circumstances, willingness to assist the investigation, evidentiary value, and working towards establishing a relationship of trust and respect.<sup>1562</sup>

Thus, before an investigation relating to SGBCs is admitted for trial, the potential victim or witness must be interviewed to assess his or her vulnerability, whether he/she will be able to take the pressure of testifying in court and also to build a relationship with the prosecution team.<sup>1563</sup> The investigation and prosecution team must therefore adopt 'a victim responsive approach in all its activities' just as espoused in the policy of the ICC's OTP.<sup>1564</sup> The team needs training in

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<sup>1561</sup> Loi n° 15/024 du 31 décembre 2015, art 26 **ter**.

<sup>1562</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes, June 2014 at paras 61 and 62.

<sup>1563</sup> Regulation 36(3) of the Regulations of the Office of the Prosecutor also provides that: '[t]he physical and psychological well-being of persons who are questioned by the Office and are considered vulnerable (in particular children, persons with disabilities and victims of gender and sexual crimes) shall be assessed by a psychology, psycho-social or other expert during a face-to-face interview prior to questioning. This assessment shall determine whether the person's condition at that particular time allows him or her to be questioned without risk of re-traumatisation.'

<sup>1564</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes, June 2014 at para 22.

eliciting information relating to SGBV from victims and witnesses.<sup>1565</sup> They must also be familiar with euphemisms used by victims and witnesses, and be sensitive to their feelings, so that they do not feel that they are being victimised.<sup>1566</sup>

NGO's such as the TRIAL International, which is a member of the Task Force International Justice network, took an active part in ensuring victims and witnesses were protected in the *Kuvumu* and *Musenyi* cases.<sup>1567</sup> In the *Kuvumu* case, for instance, codes were used to identify victims and witnesses, rather than their names throughout the court proceedings. Also when the victims or witnesses testified they were covered from head to foot and their voices altered by voice-altering equipment.

#### **6.4.8 The application of the Rome Statute by the military courts after its implementation in the law of the DRC**

Two cases are significant in showing how the military courts applied the Rome Statute after its implementation in the DRC's domestic law. These military courts were used as mobile courts in consequence of the encouragement of international and Congolese civil society.<sup>1568</sup> These two cases are discussed below.

##### **6.4.8.1 The *Kavumu* Case**

The *Kavumu* case is significant as it was the first time that a sitting DRC Member of Parliament was convicted of crimes under international law. The military court sat in the village of Kavumu, which is 32km from Bakavu, the capital city of the South Kivu province. The trial of the accused commenced in November 2017 and in December of that year the court gave judgment. Eleven men, including Frederic Batumike, a sitting Member of the South Kivu provincial parliament, were found guilty of the crimes against humanity of rape and murder, and sentenced to life imprisonment. The militia group known as 'Jesus Army', which was led by Batumike, were found guilty of abducting and raping 40 girls between the age of 18 months and 10 years between 2013 and June 2016. The victims were abducted unwitnessed as they slept in the

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<sup>1565</sup> Susana Sacouto 'International law weekend, American Branch of the International Law Association Perspectives on crimes of sexual violence in international law' (2012 – 2013) 19 *ILSA Journal of International & Comparative Law* 263 at 273 (giving as an example the Ugandan situations, where the questions asked from the girls' who were forced to live with the LRA men related to their relationship to them, rather than rape and sexual enslavement.)

<sup>1566</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes, June 2014 at para 58.

<sup>1567</sup> See below relating to these cases.

<sup>1568</sup> Trial International 'Kavumu Trial: High military court confirms all condemnations' (26 July 2018) available at <https://trialinternational.org/latest-post/kavumu-hmc-confirms-all-condemnations/> (accessed 20 September 2018).

Kavumu village. After they were raped, the victims were returned to or near their homes. These girls were raped in the belief of the fetish that the hymeneal blood from these girls gave them supernatural protection from enemy bullets.<sup>1569</sup> In considering rape as a crime against humanity, the military court considered the elements of rape in the ICC's Elements of Crime of rape. It concluded that all these elements were proved.<sup>1570</sup> In considering the *mens rea* of the accused, the military court held that the accused were aware that the rapes were committed to obtain hymenal blood from the victims for protection against their enemy.<sup>1571</sup> The military court also acknowledged the difficulty the victims would have in identifying their attackers on account of their tender age and the fact the crimes occurred at night. The court thus admitted evidence of parents, which was corroborated by expert medico-legal evidence.<sup>1572</sup> Video-recorded interviews with the victims, conducted in the presence of international and national experts on child trauma were also admitted.<sup>1573</sup> This was in line with the ICC's 2016 Policy on Children, which provides that:

... direct contact, confrontation or interaction between a child victim or witness and the alleged perpetrator should be avoided, unless the child requests otherwise. Accordingly, the Office will consider whether there is a need to request that the Trial Chamber allows the child witness to testify via video link or from behind a screen, or that the accused be absent from the courtroom for the duration of the child's testimony. The Office may also request that video or audio recordings of interviews with children be introduced pursuant to rule 68.<sup>1574</sup>

The military court recognised that whilst the criminal liability of an accused was determined by articles 25 and 28 of the Rome Statute, their criminal responsibility fell under article 25 of the Rome Statute as they were natural persons. The crime, in which Batumike participated, fell within its jurisdiction.<sup>1575</sup> This case went on appeal to the Haute Cour Militaire, which confirmed the military court's decision in July 2018.<sup>1576</sup>

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<sup>1569</sup> The Kavumu trial: Complementarity in action in the Democratic Republic of Congo.

<sup>1570</sup> République Démocratique du Congo, Justice Militaire Cour Militaire Sud-Kivu, RP 0105/2017 at 42

<sup>1571</sup> *Idem* at 44.

<sup>1572</sup> *Idem* at 43

<sup>1573</sup> The Kavumu trial: Complementarity in action in the Democratic Republic of Congo.

<sup>1574</sup> *Ibid.* ICC Policy on Children 2016, para 95. Rules of Procedure and Evidence rule 68 refers to the prior recorded testimony of witnesses.

<sup>1575</sup> République Démocratique du Congo, Justice Militaire Cour Militaire Sud-Kivu, RP 0105/2017 at 44

<sup>1576</sup> The text of the appeal judgment is not yet available.

#### 6.4.8.2 The *Muyseni* Case

The *Muyseni* Case is significant as Colonel Julius Becker, the leader of FARDC soldiers of the 33071st Battalion, was convicted by the mobile military court in Muyseni, in the province of South Kivu, for the war crimes of rape and looting committed by his troops. These crimes were committed between 20 and 22 September 2015, by FARDC soldiers against 150 civilians in the village of Muyseni, during an anti-militia operation.<sup>1577</sup> Becker's responsibility as a superior was considered under article 28(a) of the Rome Statute. The military court held that Becker had effective authority and control over his troops, as he had the power to issue or give orders, the ability to ensure that orders issued were executed and the ability to issue combat orders.<sup>1578</sup> However, concern persists that cases under article 28(a) in future might follow the approach of the Bemba Appeals Court regarding the requirement of necessary and reasonable measures taken by a commander 'to prevent or repress the commission of crimes by his subordinates'.<sup>1579</sup> The military court sentenced Becker to 10 years imprisonment, which was reduced to two years by the Haute Cour Militaire.<sup>1580</sup>

#### 6.5 Military courts a better choice to the ICC in prosecuting SGBCs

Military courts have shown in recent prosecutions a proficiency in applying the Rome Statute to SGBCs, albeit with the help of NGOs such as TRIAL International and Physicians for Human Rights from the first investigation stage to the conclusion of the case. Prosecuting cases in the locations where the crimes occurred and conducting trials in the villages where the victims reside has been more beneficial to the victims, than taking the case to the seat of the ICC at The Hague. Victims are more comfortable with proceedings in their home areas that they are less formal and not as complex as ICC cases. The duration of cases in the DRC, once the prosecution is ready for trial, is short compared to the ICC. The *Kavumu* case for example, was heard in 23 days. Cases tried by the ICC are prolonged by complex logistical problems. However, cases brought before the military courts have their own challenges. For example, the successful prosecutions of a commanding officer and a Member of Parliament in the *Musenyei* and *Kavumu* cases were only possible without outside interference with the judicial function; it is hoped that these cases were

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<sup>1577</sup> DRC: Justice has spoken for the 150 victims of Musenyei available at <https://trialinternational.org/latest-post/drc-justice-has-spoken-for-the-150-victims-of-musenyei/> (accessed 20 September 2018).

<sup>1578</sup> Republic Democratique du Congo, Justice Militaire Cour Militaire Du Sud-Kiv, RP no 093/016, RMP No 1625/BMG/016 at 41.

<sup>1579</sup> See chapter 4, section 4.4.1.6(i).

<sup>1580</sup> The text of the appeal judgment is not yet available.

not exceptional in that regard and that the government will not interfere if similar perpetrators are prosecuted in future. Also, the ICC prosecutor has learnt from previous experiences, based on criticisms for not prosecuting Ugandan and the DRC government forces, to be more cautious as to the choice of cases.<sup>1581</sup>

ICC prosecutions are hindered by its lack of a police force and having to rely on host states for the arrest and surrender of alleged perpetrators. As a result of South Africa's refusal to arrest Al-Bashir, the ICC found it was pointless to refer the matter to the United Nations Security Council or Assembly of State Parties, as previous such referrals had failed. However it is worth noting that in the *Kavumu* case, when the prosecutor refused to commence proceedings despite substantial evidence, a successful application was made to change the prosecutor. Prosecuting SGBCs in the DRC for the moment seems to be the best option, although the bringing of prosecutions is reliant on the initiatives of international and civil actors. However, many more prosecutions are needed to bring justice to victims and curb impunity.

## 6.6 CONCLUSION

This chapter analysed the Act which implements the Rome Statute in the DRC's domestic laws. Since ratifying the Rome Statute in 2002, it has taken the DRC 14 years to promulgate the Rome Statute in its domestic laws. The delay has hindered the proper prosecution of SGBCs committed in armed conflicts. Analyses in this chapter established that the implementation of the Rome Statute in the DRC's domestic laws has addressed many defects in its criminal laws with regard to the prosecution of SGBCs at the international level. It has for example, included command responsibility in the DRC's domestic laws, which is important to bring military commanders and non-military superiors within the reach of the law. In addition to this, perpetrators of SGBCs no longer qualify for amnesty, and peace deals with the DRC can no longer subvert prosecutions. The Act also clarifies certain issues relating to the DRC's relationship with the ICC in the investigation and prosecution of SGBV at the international level – for example, states cooperating with the ICC in the arrest and surrender of those wanted by the ICC. The Act however differs from the Rome Statute by maintaining the death penalty as a possible sentence for convicted perpetrators. The assumption is that the DRC contends that the death penalty is

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<sup>1581</sup> See chapter 3.

warranted on the assumption that ‘international’ crimes are as serious as other crimes under its domestic laws which carry the death penalty. Although the military courts have not yet pronounced a death sentence, the Act should be amended by removing the death sentence to bring its sentencing in line with that of the Rome Statute.

It was observed that the help of international actors has made the successful prosecution of SGBCs possible. However, the government also needs to play its part in investigating and prosecuting these crimes by funding for example the building of more courts which are easily accessible to those living in rural communities. This is essential as it would encourage victims to contribute to investigations and take part in trials. It is also important that more lawyers are trained in the prosecution of SGBV cases, taking into consideration the number of rapes which occur in provinces such as South Kivu.

The chapter concludes that, with the implementation of the Rome Statute in the DRC’s domestic laws, the effective investigation and prosecution of these crimes at the domestic level could close the impunity gap for SGBCs. However, the DRC still needs the help and experience of international actors in the investigation and prosecution of these crimes.

## **CHAPTER SEVEN**

### **CONCLUSION AND RECOMMENDATIONS**

#### **7.1 INTRODUCTION**

The international, regional and domestic prosecutions of sexual and gender-based crimes (SGBCs) committed in armed conflict situations are important to close the impunity gap which has historically accompanied these crimes. Prosecuting these crimes not only brings justice for victims, but it also reduces the stigmatisation experienced by the victims, by transferring the blame to the perpetrators.

This thesis assumes that African states which ratify the Rome Statute at the international level, the proposed Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights (Malabo Protocol) at the regional level and incorporate the Rome Statute into their domestic laws, are committing themselves to ending the incidence of sexual and gender-based violence (SGBV) committed in armed conflict situations.

This thesis is premised on the belief that when SGBV is prosecuted at these three levels the historic impunity enjoyed by perpetrators is removed. Active prosecution at all three levels not only restores the victims' rights and dignity but also serves as an effective deterrent to future perpetrators of these crimes. It is also contended that in order to close the impunity gap for SGBV crimes, all three levels at which prosecutions may be possible must be coordinated in order to effectively prevent perpetrators of SGBV from escaping prosecution.

This thesis provided an original contribution to the legal knowledge in this area through researching, comparing and analysing how investigations and prosecutions of SGBV committed in armed conflict situations occur in practice at these three levels. The analysis illustrated that prosecutions for SGBV crimes are as important as those for genocide or murder. This thesis argues that the impunity gap can and needs to be closed at the international, regional and domestic prosecutorial levels. This task is not achieved with the same level of ease at every level; nonetheless, this thesis has identified a number of factors which need to be addressed before the impunity gap can be bridged at each of these three levels.

## 7.2 SUMMARY OF FINDINGS

This chapter provided the summary of the findings and conclusions on the research question posited in chapter one of this thesis. Recommendations on modalities for more effective approaches were made on how to bridge the impunity gap of SGBV committed in armed conflict situations, at the three prosecutorial levels.

The research questions raised in chapter one were addressed in the various chapters of this thesis as follows:<sup>1582</sup>

1. What is the historical framework relating to criminalisation and prosecution of SGBV in armed conflict situations under international law?
2. Have the conflicting views of the definition of rape at the ICTY and ICTR helped strengthen the prosecution of SGBV in armed conflict situations before the ICC?
3. In what ways has the ICC failed in bringing perpetrators of SGBV in armed conflict situations to justice?
4. Will the proposed implementation of international law crimes in the African Court of Justice and Human and Peoples' Rights (ACJHPR) be a viable alternative in prosecuting SGBV in armed conflict situations at the regional level?
5. Can the promulgation of the Rome Statute in the DRC's domestic laws help bridge the impunity gap in the fight against SGBV committed in armed conflicts in Africa?

The following conclusions were made regarding each question.

### 7.2.1 What is the historical framework relating to the criminalisation and prosecution of SGBV in armed conflict situations in international law?

This question, addressed in chapter two, concluded that SGBV in armed conflict situations was previously considered as an inevitable consequence of war or collateral damage to be tolerated. Women and girls were considered men's property, which impacted negatively on how SGBV was viewed.<sup>1583</sup> This pervasive mindset affected the manner in which such crimes were tried in

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<sup>1582</sup> See chapter 1, section 1.5.

<sup>1583</sup> Moreover it is now acknowledged that although women and girls' are the predominant victims of these crimes, men and boys are also victims of SGBV committed in armed conflict (Sandesh Sivakumaran 'Sexual violence against men in armed conflict' (2007) 18 *European Journal of International Law* 253-276).



tribunals like the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE). Gender-specific crimes, such as rape against women and children, were marginalised before these tribunals. They were either not prosecuted or not adequately prosecuted. This omission lent credence to the notion that rape and sexual assaults committed in times of armed conflicts were not as serious as grave crimes like genocide traditionally committed during armed conflicts. Scholars have argued that the marginalisation of these crimes was because the tribunals were more comfortable in prosecuting crimes against peace rather than gender-specific crimes. This lack of understanding of the gravity of sexual violence has prevented its inclusion as criminal in international treaties and has inhibited the prosecution of these crimes,<sup>1584</sup> reducing gender-specific crimes to being insignificant and seemingly invisible.<sup>1585</sup>

Given the blindness of the international community and tribunals to SGBVs, feminist scholars and activists, and various non-governmental organisations (NGOs), actively sought to have gender-specific crimes, such as rape and forced marriage perpetrated against civilian women and girls in armed conflict situations, recognised in international instruments and prosecuted in their own right. The genocide and ethnic cleansing in the former Yugoslavia in 1993 and in Rwanda in 1994, gave feminist scholars and NGOs an opportunity to employ the development of international humanitarian laws to address crimes of SGBV and cause laws relating to these crimes to be implemented. The statutes for the International Criminal Tribunal for former Yugoslavia (ICTY) and Rwanda (ICTR) explicitly listed rape and enslavement as crimes against humanity and prosecutable as such.<sup>1586</sup> The case-law arising from both tribunals provides evidence of recognition of gender-based violence as war crimes, crimes against humanity and genocide in international criminal law, thus ending the pattern of reluctance by the international community to prosecute SGBV crimes.<sup>1587</sup> Though these two tribunals were limited to specific regions and conflicts, the inclusion of the crimes of rape and enslavement helped pave the way for gender-specific crimes to be included in the International Criminal Court's (ICC's) Rome Statute. Gender-specific crimes such as rape, sexual slavery, enforced prostitution and forced pregnancy are prosecutable crimes in their own right in the Rome Statute, and as crimes

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<sup>1584</sup> Chapter 2, 2.2.1

<sup>1585</sup> Chapter 2, 2.2,

<sup>1586</sup> ICTY Statute, art 5(c) and (g), ICTR Statute, art 3(c) and (g).

<sup>1587</sup> Chapter 2, 2.3.2.

against humanity and war crimes.<sup>1588</sup> Nonetheless, these crimes can only be prosecuted if perpetrated after July 1, 2002, the date on which the Rome Statute came into force after obtaining the required 60 ratifications.

The inclusion of SGBCs in international treaties is to be welcomed. This chapter, however, argues that though inclusion of these crimes in international treaties is necessary, there is also the need for their effective investigation and prosecution.

### **7.2.2 Have the conflicting views of the definition of rape at the ICTY and ICTR helped strengthen the prosecution of SGBV in armed conflict situations before the ICC?**

The laws of war, codified in conventions such as The Hague Conventions and Regulations, the Fourth Geneva Convention 1949 and the 1977 Additional Protocols, implicitly or explicitly prohibited rape. The prohibition of rape in these conventions, was framed in a manner which implied that rape was a violation against a woman's honour or dignity, rather than as an offence against her person.<sup>1589</sup> The jurisprudence flowing from the two *ad hoc* tribunals of the ICTY and ICTR made a remarkable contribution to the development of the concept of rape and other SGBCs committed in armed conflicts as crimes in their own right at the international level.<sup>1590</sup> Both tribunals had to develop their definition of rape, as there was no commonly accepted definition of rape in international law.<sup>1591</sup> The ICTR in *Prosecutor v Akayesu* made the first finding of rape as a crime against humanity in the context of sexual violence under international law.<sup>1592</sup> The tribunal's definition of rape is gender-neutral so as to include the rape of men and children and broad enough to include objects used in physically invading any part of the victim's body. The tribunal also held that sexual violence included rape and was 'not limited to a physical invasion of the human body and may include acts which do not involve penetration or even

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<sup>1588</sup> Rome Statute, arts 7(1) (g) and 8(2) (e) (vi).

<sup>1589</sup> Article 46 Convention respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land; art 27 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 and art 76(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

<sup>1590</sup> See for example, *Prosecutor v Furundzija*, (Trial Judgment), Case No.IT-95-17/1/T, Dec. 10, 1998 para 172 (stating that '[t]he prosecution of rape is explicitly provided for in article 5 of the Statute of the International Tribunal as a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws of customs of war, or an act of genocide, if the requisite elements are met, and may be prosecuted accordingly').

<sup>1591</sup> See for example, *Prosecutor v Akayesu* (Trial Judgment) Case No ICTR 96-4- T, Sept2, 1998, para 686, *Prosecutor v Furundzija*, (Trial Judgment), Case No.IT-95-17/1/T, Dec. 10, 1998, paras 175 – 184.

<sup>1592</sup> This was the first case in international law to define rape, before then there was no accepted definition of rape in international law. See *Prosecutor v Akayesu* (Trial Judgment) Case at paras 596-597.

physical contact’,<sup>1593</sup> such as forced nudity. Rape was also recognised as a form of torture.<sup>1594</sup> In addition to a conviction for rape, Akayesu was convicted of genocide as the tribunal held that rape could constitute genocide.<sup>1595</sup>

The ICTY did not follow the ICTR’s definition of rape; the Trial Chamber in *Prosecutor v Furundzija* adopted a narrower definition of rape, and developed a mechanical approach in its definition.<sup>1596</sup> However, the judgment in *Furundzija* did develop the law by recognising sexually violent crime as torture. The accused was found guilty of torture as a war crime under article 3 of its statute, as rape was held to constitute torture.<sup>1597</sup> The accused was also convicted of outrages upon personal dignity, including rape as a war crime under article 3 of its statute.<sup>1598</sup> On the other hand, in *Prosecutor v Kunarac et al*, the Trial Chamber adopted what Sellers refers to as ‘a two-pronged lack-of-consent requirement’.<sup>1599</sup> For the first time, an international Trial Chamber directly examined consent in rape, without inferring there was lack of consent from the coercive circumstances in which the rape was committed.<sup>1600</sup> The Trial Chamber, thus, developed its own definition of rape, retaining the mechanical element of rape in the *Furundzija* judgment, but removing the requirement of coercion, force or threat of force. *Furundzija* is the first case in which a tribunal has convicted an accused for rape as a crime against humanity and for enslavement together with rape. Other crimes which were gender-related included torture, and outrages upon personal dignity.

In *Prosecutor v Gacumbitsi*, the ICTR Appeals Chamber clarified the issue of consent relating to rape given in the *Kunarac* case in response to the conflicting judgments given in the *Akayesu* and *Kunarac* cases. The Appeals Chamber reaffirmed the interpretation of rape given in the *Kunarac* appeal judgment, by stating that the required elements of the crime of rape, as a crime against humanity were proof beyond a reasonable doubt of non-consent of the victim and

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<sup>1593</sup> *Idem* at para 688.

<sup>1594</sup> *Idem* at para 579.

<sup>1595</sup> *Idem* at paras 731 and 734.

<sup>1596</sup> *Prosecutor v Furundzija*, (Trial Judgment) Case at para 185.

<sup>1597</sup> *Idem* at paras 268 and 269.

<sup>1598</sup> *Idem* at para 275.

<sup>1599</sup> Patricia Viseur Sellers ‘The prosecution of sexual violence in conflict: The importance of human rights as means of interpretation’ at 21 available at <http://www.PVSellers-2012-zh.unrol.org> (accessed 14 January 2015).

<sup>1600</sup> Ryan S Lincoln ‘Too Rough a Justice: The Ethiopia-Eritrea Claims Commission and International Civil Liability for Claims for Rape under International Humanitarian Law’ (2012) 20 *Tulane Journal of International and Comparative Law* 385 at 393.

that the accused was aware of such non-consent.<sup>1601</sup> It also ruled that non-consent may be inferred from existing coercive circumstances, without having to prove that the victim did not actually consent.<sup>1602</sup>

The ICTY and ICTR helped pave the way for the inclusion in an international treaty of SGBCs committed in armed conflicts. However feminist scholars and NGOs had no easy task to ensure that crimes of gender-based violence were included in the Rome Statute as crimes in their own right.<sup>1603</sup> The Rome Statute includes a broader range of SGBCs than those in the ICTY and ICTR statutes which cited rape only as a war crime and crime against humanity<sup>1604</sup>. The ICC's Elements of Crimes assists the court 'in the interpretation and application' of crimes within its jurisdiction. Thus, the ICC would not need to refer to various states' legal definition of rape to assist it with a legal definition of rape, as was the case in the ICTY and ICTR.

### **7.2.3 In what ways has the ICC failed in bringing perpetrators of SGBV in armed conflict situations to justice?**

In answering this research question, chapter three considered the mistakes the ICC's Prosecutor made in exercising his discretion in investigating and prosecuting crimes of SGBV committed in armed conflict. Chapter four examined the prosecution of these crimes before the ICC. The contention was that the unsuccessful prosecution of perpetrators (when successful prosecutions could have been obtained) resulted in victims of SGBCs not obtaining justice. The ICC lost the opportunity to prove to the international community that rape and other SGBCs committed in armed conflicts were on the same footing as other grave crimes, such as murder and genocide. Continuous unsuccessful prosecutions of SGBCs could result in deterring victims from giving evidence before the ICC, as they might feel that the ICC was not the court where justice could be obtained. Victims would also have not received reparations with which they could have rebuilt their lives. This thesis concludes that there are three prominent factors which have made it difficult to secure convictions for SGBV before the ICC.

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<sup>1601</sup> *Gacumbitsi v Prosecutor* (Appeal Judgment) Case No. ICTR-2001-64-A, July 7, 2006, para 152.

<sup>1602</sup> *Idem* at para 155.

<sup>1603</sup> Valerie Oosterveld 'The definition of "Gender" in the Rome Statute of the International Criminal Court: A step forward or back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55 at 56-66.

<sup>1604</sup> Rome Statute, arts 7 and 8.

### 7.2.3.1 Non-investigation and prosecution of sexual and gender-based crimes committed in armed conflict.

Whilst the Rome Statute directs how the Prosecutor should exercise his/her discretion, in the investigation of situations and prosecution of cases the final decision is left to the Prosecutor. In the first case before the ICC, *Prosecutor v Lubanga*, although the Prosecutor initially stated that he was willing to investigate crimes other than those charged; such crimes did not include SGBCs committed in armed conflicts. These crimes were ‘allegations related to the intentional direction of attacks against the civilian population, murders committed during and after these attacks, the pillaging of towns and places, and ordering the displacement of the civilian population’.<sup>1605</sup> The Prosecutor declined to pursue charges for SGBCs, despite the fact that mass rapes committed by armed militia groups and government forces earned the DRC special notoriety<sup>1606</sup> as the ‘rape capital of the world’.<sup>1607</sup> Rather than amending the charges to include SGBCs, the Prosecutor preferred to make submissions regarding sexual violence in his opening and closing speeches at the trial, and asked the Trial Chamber to take into account sexual violence as an aggravating factor in sentencing.<sup>1608</sup>

The Prosecutor’s refusal to include SGBCs in the charges against Lubanga, even though there was evidence that such crimes had occurred, can be differentiated from cases such as *Prosecutor v Akayesu*, heard before the ICTR, where the trial was adjourned to allow the Prosecutor to amend the charges to include sexual violence charges, after further investigations had been made.<sup>1609</sup>

In sentencing Lubanga, the majority Chamber, who were males, found that the evidence before them was not sufficient to include sexual violence and rape as aggravating factors in determining sentence, holding that the Prosecutor had failed to establish beyond reasonable doubt the link between the accused and sexual violence. However, Judge Odio Benito, in her

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<sup>1605</sup> *Prosecutor v Thomas Lubanga Dyilo* ‘Prosecutor’s information on further information’ paras 3, 7 and 9, (28 June 2006) ICC-01/04-01/06.

<sup>1606</sup> DRC: The forgotten rape capital of the world (7 March 2012) available at: <https://www.issafrica.org/iss-today/drc-the-forgotten-rape-capital-of-the-world> (last accessed 25 March 2016).

<sup>1607</sup> Margot Wallstrom, former special representative on sexual violence in conflict made this reference after her visit to the DRC in 2010. UN News Centre n 5 above. *Ibid*.

<sup>1608</sup> The Prosecutor could have amended the charges to include SGBCs if he chose to before the confirmation hearing, or after the confirmation hearing but before the commencement of the trial. Rome Statute, arts 61(4) and (9).

<sup>1609</sup> *Prosecutor v Akayesu* (Trial Judgment) Case at para 6. Kelly D Askin ‘Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals: Current status’ (1999) 93 *The American Journal of International Law* 97 at 105-106.

dissenting opinion on sentence, disagreed with the majority Chamber for not finding the evidence of sexual violence relevant in considering the damage caused to the victims and their families in accordance with Rule 145(1)(c) of the Rules. She was of the opinion that there was sufficient evidence of sexual violence, as the victims had suffered this harm because of their recruitment into the militia. She was also of the opinion that taking these factors into consideration in the determination of sentence would not be prejudicial to Lubanga, as he would have had sufficient notice, time and facilities to prepare his defence during the hearing. Judge Benito's dissenting judgment confirms the argument put forward by feminists for the need to have a fair representation of female judges who are sensitive to gender issues.<sup>1610</sup>

#### **7.2.3.2 Lack of proper investigation of sexual and gender-based crimes by the Office of the Prosecutor and proving elements of SGBCs.**

Two of the most notable cases relating to the prosecution's failure to investigate SGBCs committed in armed conflicts were the cases against Katanga and Chui. The cases against the accused were joined in March 2008, but later severed in November 2012, when the Trial Chamber decided to recharacterise the mode of liability relating to Katanga's case, pursuant to regulation 55 of the regulations of the court. Chui was acquitted of all charges, which included sexual slavery as a war crime and crime against humanity. The Trial Chamber reprimanded the OTP for the weaknesses in its investigation. The evidence in Katanga's case basically the same as in Chui's case. Although the Trial Chamber re-characterised the mode of liability against Katanga, a different mode of participation was substituted instead.<sup>1611</sup> Katanga was found guilty of all the charges brought against him, which included murder as a war crime and crimes against humanity, but not for the crimes of rape and sexual slavery as crimes against humanity and war crimes under article 25(3) (d) of the Rome Statute, and also of using child soldiers as a war crime under article 25(3) (a) of the same statute. The Trial Chamber held that the prosecution had established a 'common purpose' for the crimes Katanga was convicted of, but had not established a 'common purpose' for the crimes of rape and sexual slavery. This case demonstrated that trial chambers find it easier to convict an accused for crimes such as murder rather than SGBCs. As stated by Askin, ICC judges were reluctant 'to hold individuals

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<sup>1610</sup> Cherie Booth and Max Du Plessis 'The International Criminal Court and victims of sexual violence' (2005) 18 *South African Journal of Criminal Justice* 241 at 248. Askin 'Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals' at 98.

<sup>1611</sup> Kevin Jon Heller 'Another Terrible Day for the OTP' available at [opiniojuris.org/2014/03/08/another-terrible-day-otp/](http://opiniojuris.org/2014/03/08/another-terrible-day-otp/) (accessed on 25 March 2016).

accountable for sex crimes unless they are the physical perpetrators, they were present when crimes were committed, or they can be linked to evidence encouraging the crimes'.<sup>1612</sup> Apart from this, judges have required a high evidential burden of proof from prosecutors when prosecuting SGBCs.

The OTP's presentation of weak evidence before the Trial Chamber was as a result of its focused approach to 'carry out short investigations and propose expeditious trials, while aiming to represent the entire range of criminality'.<sup>1613</sup> Given that SGBCs are difficult to prove, the OTP needed more time to prepare its cases for trial, with staff who were experienced in sexual and gender-based criminal matters.

### **7.2.3.3 Non-cumulative charging and the Bemba Appeals Chamber decision**

This thesis argues that the Pre-Trial Chamber's decision not to charge the crimes of torture as a crime against humanity and outrages upon personal dignity as a war crime cumulatively with the charge of rape, again ranked crimes of SGBV as crimes less serious than other grave crimes such as murder and genocide.

The Pre-Trial Chamber in the *Bemba* case held that torture and outrages upon personal dignity were subsumed under the category of rape. Their reasoning was that because these crimes were not 'distinct crimes' to the crime of rape; they did not have an additional material element which was not contained in the rape charge. It is submitted that the Pre-Trial Chamber erred in its judgment as the ICC's Elements of Crimes provide different elements which must be proved for each of these crimes. In addition to this, a review of the negotiating history of the Rome Statute and of the Elements of Crimes suggests that these crimes can be charged cumulatively. The Pre-Trial Chamber also held that charging these crimes cumulatively at this stage was not critical as regulation 55 of the Regulations of the Court allowed trial chambers to re-characterise crimes. A differently constituted Pre-Trial Chamber at the confirmation of charges hearing in the case against Dominic Ongwen however, held that decisions relating to 'concurrence of offences' were best left to Trial Chambers to decide. Powers of the Pre-Trial

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<sup>1612</sup> Askin 'Katanga judgment underlines need for stronger ICC focus on sexual violence' (10 March 2014) available at: [www.ijmonitor.org/.../katanga-judgment-underlines-need-for-stronger-icc-focus-on-s...](http://www.ijmonitor.org/.../katanga-judgment-underlines-need-for-stronger-icc-focus-on-s...) (last accessed 25 July 2016).

<sup>1613</sup> Prosecutorial Strategy, 2009-2012, 1 February 2010, p 6 available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2010> (accessed 1 November 2016).

Chamber to refuse to confirm charges have been debated with reference to article 61(7) of the Rome. At Ongwen's confirmation of charges hearing, the Pre-Trial Chamber differed from the Pre-Trial Chamber in the *Bemba* case; by holding that article 61(7) allows the Chamber to confirm charges where the prosecutor has achieved the requisite burden of proof. If future cases before the ICC follow the Pre-Trial Chamber's decision in the Ongwen's case relating to cumulative charging, trial chambers could convict perpetrators of SGBCs cumulatively. This would also reflect the true nature of the crimes committed by perpetrators of SGBV committed in armed conflicts.

Also, the Appeals Chamber decision in the *Bemba* case has created confusion as to the procedure for bringing cases before the ICC and interpretation of the Rome Statute. This will affect future cases on SGBCs if further Appeals Chambers follow the method which the Bemba Appeals in Chamber took arriving at its decision.

#### **7.2.4 Will the proposed implementation of international law crimes in the African Court of Justice and Human and Peoples' Rights (ACJHPR) be a viable alternative in prosecuting SGBV in armed conflict situations at the regional level?**

This question was addressed in chapter five of this thesis. This thesis argues that prosecuting SGBCs committed in armed conflicts at the regional level will be necessary to bridge impunity gaps which cannot be dealt with at the international or domestic level. It also argues that the proposed African Court of Justice and Human and Peoples' Rights (ACJHPR) will not be able to achieve this goal until the Malabo Protocol is redrafted to accommodate certain provisions; it is not viable in its present state, in particular with reference to the immunity clause article. In redrafting the Malabo Protocol, the AU needs to consult with various international bodies and NGOs to create a workable treaty.

Once the proposed ACJHPR starts operating, it is suggested that its staff work in tandem with the ICC so that the impunity gap can be bridged at both levels of prosecution. The thesis concludes that in its present form, the proposed ACJHPR would not be able to meet the demands of investigating and prosecuting SGBCs committed in armed conflicts. It could take years before the Malabo Protocol is properly drafted if the AU does not show political will in prosecuting these crimes, and years before the required number of signatories are obtained to bring the Malabo Protocol into force and before the proposed court can reach the investigative and



prosecutorial level achieved by ICC. Also the fact that the AU favours entering into peace negotiations with perpetrators of SGBCs does not help solve bridging the immunity gap.

### **7.2.5 Can the promulgation of the Rome Statute after enactment in the DRC's domestic laws help bridge the impunity gap in the fight against SGBV committed in armed conflicts, in Africa?**

Chapter six began by giving a summary history of the occurrence of SGBV in armed conflict in the DRC. It also gave an account of the DRC's domestic laws relevant to SGBV committed in armed conflict before the Rome Statute was passed as part of the DRC's domestic law. The provisions of the Rome Statute came into force in the DRC 30 days after they were published in the DRC's Official Journal on 29 February 2016,<sup>1614</sup> demonstrating a commitment by the DRC to prosecute SGBV committed in armed conflicts according to international law. The Act amends and completes the rationalisation of the Congolese Penal Code, Military Penal Code and Penal Procedure Code, thus bringing these laws in line with that of the Rome Statute.

The Act not only spells out the relationship between the ICC and the DRC courts relating to the prosecution crimes of genocide, war crimes and crimes against humanity, but also the DRC's courts' obligations in prosecuting these crimes. Issues such as cooperation with the ICC in the investigation and prosecution of SGBCs, arrest and surrender of perpetrators of SGBCs and competing applications between the ICC and other states were addressed. The Act contains a provision for the prosecution of military commanders and civilian superiors, which was never provided for in its domestic laws. Prosecuting these classes of people bridges the impunity gap for SGBCs committed by state agents. The Act deviates from the Rome Statute by providing for the death penalty, and not imprisonment, where an accused is found guilty of these crimes. The thesis argues that in imposing the death penalty the DRC has brought SGBV committed in armed conflicts to the same level as other grave crimes in its domestic laws for which the sentence of death is competent.

This thesis also contends that although mobile courts are presently best placed to prosecute SGBCs, they may not be the best mode of prosecution in the long run, on account of the cost of organising and running such courts. The thesis makes recommendations for the effective investigation and prosecution of SGBCs, concluding that military courts, with the help

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<sup>1614</sup> *Journal Officiel de la Republique Democratique du Congo.*

of international actors, appear to be the best forum at present for bringing perpetrators to justice. Furthermore, an increase in the number of permanent courts in more remote areas of the DRC will help facilitate access to justice for victims and witnesses. Other steps necessary for an effective investigation and prosecution of SGBVs are also mentioned below as recommendations.

### **7.3 Impediments to the investigation and prosecution of SGBV committed in armed conflicts common at all three levels.**

There are two key impediments which this thesis has identified that will affect bridging the impunity gap for SGBV committed in armed conflicts at the international, regional and domestic levels. The first is insufficient resources for the investigation and prosecution of these cases, and the second the prosecution of heads of state and senior officials who are still in power.

#### **7.3.1 Resources**

Having sufficient resources to mount the fight against SGBV committed in armed conflict is paramount. Insufficient resources handicapped the ICC in thoroughly investigating and prosecuting its first few cases, which forced it to adopt a sequential approach in its investigations, which led to the acquittal of those charged with SGBV. African states which are parties to the Rome Statute, which become parties to the Malabo Protocol and also prosecute SGBV at the domestic level, will find it difficult to meet their financial obligations at all these levels. As SGBV cases are complex and time-consuming, a great amount of funding needs to be ploughed into the investigation and prosecution of these cases.

Some African states are yet to meet their financial obligations at the international level. With regard to the regional level, the proposed ACJHPR will be overwhelmed by the volume of crimes to be prosecuted, considering the number of crimes over which the court has jurisdiction. Even with a restructuring of the court, it will still face a problem with funding. This thesis suggests that the proposed ACJHPR, once it starts operating, should consider following the lead of the ICC in adopting a concurrent approach to its investigations, which would help it to effectively utilise its resources, dedicate sufficient time in the collection and analysis of evidence, planning of cases and decision-making, and the identifying and selection of witnesses,

as certain states may fail to meet their financial obligation to the proposed ACJHPR.<sup>1615</sup> Even in the event of the DRC having resources to investigate and prosecute SGBCs, the DRC would need to continue relying on international help, as is the case with the ICC.

### **7.3.2 Prosecuting Heads of States and top government officials**

Prosecuting heads of state and top government officials is going to be a major problem at all levels of prosecution, as observed in *Prosecutor v Omar Hassan Ahmed Al Bashir*, unless states are willing to cooperate in the arrest and surrender of such persons wanted by the court making the request.<sup>1616</sup> Without such cooperation, an immunity gap is created in the investigation and prosecution of these persons. In addition to this, at the international level, if a state is not willing to allow the ICC to investigate the situation in that state, the evidence needed to prosecute the case would be lacking. With the ICC's caseload increasing, it would prefer to prosecute those persons in respect of whom it could easily obtain cooperation from a state to investigate and prosecute. Also, the ICC is unlikely to invest in cases where cooperation is not forthcoming, as finances could better be diverted to investigate and prosecute other cases.

At the regional level, article 46A bis of the Malabo Protocol provides for the non-prosecution of sitting heads of states and senior government officials. The problem with this provision is that a number of African heads of states do not relinquish power when they have served their term in office. By the time they do relinquish power; victims might have already lost hope of obtaining justice, as they would have had to wait years before the accused is prosecuted, some victims would have died and victims' memory of recounting the exact event may have faded. Also, this would not have a deterrent effect in preventing perpetrators from committing SGBCs, as they would hope that they would never have to face trial.

## **7.4 RECOMMENDATIONS**

The following recommendations were made to the ICC, the AU and the DRC for the effective investigation and prosecution of SGBV committed in armed conflict:

### **7.4.1 ICC policy**

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<sup>1615</sup> ICC, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para 49 available at [www.icc.cpi.int/.../OTP-Policy-Paper-on-Sexual-and-Gender-Based-Cri...](http://www.icc.cpi.int/.../OTP-Policy-Paper-on-Sexual-and-Gender-Based-Cri...) (accessed on 25 October 2016).

<sup>1616</sup> Chapter 6 under 6.4.5.

The ICC's policy paper on sexual and gender-based crimes, its strategic plan for 2016 to 2018, and its 2016 policy paper on case selection are to be welcomed.<sup>1617</sup> The policies reveal that the ICC still needs to work hard to bring SGBCs to the forefront.

The following recommendations are made for bridging the impunity gap at the international level with regard to SGBCs committed in armed conflict:

1. The OTP should rebuild its relationship with member states, as their assistance in the arrest and surrender of perpetrators of SGBCs is vital. This could be done by engaging those African states which have a strong influence on other African states to conduct dialogue on its behalf.
2. The OTP should periodically review its Policy Paper on Sexual and Gender-based Crimes, considering the complexity involved in investigating and prosecuting these crimes.<sup>1618</sup>
3. The OTP must ensure that charges are properly drafted and that the evidence relates to the elements of the crimes charged.<sup>1619</sup>
4. ICC judges need to be sensitive to sexual and gender-based issues and consider them on the same level of importance as other serious crimes. They must correctly interpret the law, for example, with regard to the elements of crimes required for crimes relating to SGBV.<sup>1620</sup>

**7.4.2 At the regional level the following recommendations were made to the AU and the proposed ACJHPR in bridging the impunity gap for SGBCs committed in armed conflict:**

To the AU:

1. Amend the following articles in the Malabo Protocol:<sup>1621</sup>
  - Article 46A bis on immunity. Alternatively have a provision similar to article 16 of the Rome Statute or enter reservations to article 46A bis;

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<sup>1617</sup> See chapters 3, 5 and 6.

<sup>1618</sup> The ICC for example has a Strategic Plan for June 2012-2015 and 2016 -2018. The Policy Paper on Sexual and Gender-Based Crimes was published in June 2014.

<sup>1619</sup> See chapter 3 under 3.3.3. Also chapter 4 under 4.4.1.2.

<sup>1620</sup> See for example chapter 4, regarding the ICC judges' refusal to cumulatively charge the crimes of torture and outrages upon personal dignity. 4.4.1.2 (The confirmation of charges hearing), and 4.5.4 (non-confirmation of cumulative charges).

<sup>1621</sup> See Chapter 5, section 5.3.2.

- Article 28B, under the genocide *chapeau* to include the term ‘political groups’;
- Article 28C relating to crimes against humanity, by defining the term ‘enterprise’;
- Define the term ‘cruel inhuman and degrading treatment or punishment’ under article 28C(f);
- Amend article 28D(b)(xxvii) to include the term militia groups as they are also conscript or enlist children.
- Amend article 34(b) which limits NGOs’ and individuals’ ability to institute proceedings where a state has not made a declaration.

To the proposed ACJHPR:

1. Employ a special adviser on gender issues.
2. A policy document on sexual and gender-based crimes must be drafted and also a document defining the proposed court’s strategic plans in the investigation and prosecution of SGBV committed in armed conflicts.
3. It is essential that the staff and judges appointed to the proposed court are adequately trained to identify and be sensitive to gender issues before the court. They should also be trained to identify gender aspects in crimes such as trafficking, which are non-sexual violent crimes.<sup>1622</sup>

#### **7.4.3 At the domestic level, using the DRC as a case study, the following recommendations were made:**

To the DRC Government:

1. Take an active part, with international and civil actors, in the prosecution of SGBCs.
2. Invest in building more courts to make it easier for victims and witnesses of SGBV to have access to justice and give evidence in court. Also facilitate their access to legal assistance. With regard to existing courts, invest in equipping them and their personnel to investigate and prosecute SGBCs.

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<sup>1622</sup>See Special adviser on gender completes her mandate (August 2016) available at [www.4genderjustice.org/pub/Special-Adviser-on-Gender-completes-her-mandate.pdf](http://www.4genderjustice.org/pub/Special-Adviser-on-Gender-completes-her-mandate.pdf) (accessed on 19 May 2016). Ms Inder, on leaving office as the special adviser to the OTP, suggested that the OTP should ‘identify gender aspects within non-sexual violence crimes and the context within which these crimes occur.’ This recommendation would also be useful at the regional level as the proposed ACJHPR would have jurisdiction over crimes which are non-sexual violent crimes.

3. Continually engage with international donors to provide financial and technical support for mobile military and civil courts to facilitate effective investigation and prosecution of SGBV crimes.<sup>1623</sup>
4. Intensively sensitise society to SGBV, so that victims will not be stigmatised by their community. At the same time, have campaigns which will let perpetrators of this crime know that their actions will not be tolerated.
5. Periodically train military commanders and civilian superiors on the Rome Statute, international humanitarian law and international human rights law so that they are aware that if they fail to control their troops that they would be prosecuted for failing to effectively do so.<sup>1624</sup>
6. Allow courts to have a free hand in bringing prosecutions against perpetrators of SGBCs, irrespective of their rank.
7. Amend the provision for the death penalty in the law implementing the Rome Statute to bring it in line with international law, which does not provide for the death sentence.

To the DRC courts and police:

1. Increase the capacity of the specialised national police unit which receives and responds to SGBCs. Also sensitise the police and prosecutors to bring cases of SGBCs before the courts.<sup>1625</sup> Do not depend on local NGOs to refer cases which have been classified as priority to the court.
2. Integrate a gender perspective and analysis at all stages of its work.<sup>1626</sup>

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<sup>1623</sup> This is the fourth strategic goal which the ICC had adopted, to enable it to monitor, prove and present crimes due to the growth in various forms of technology. Strategic Plan| 2016-2018, 6 July 2015 at 23 available at [https://www.icc-cpi.int/.../070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/.../070715-OTP_Strategic_Plan_2016-2018.pdf) (accessed 11 November 2016). As the DRC is unlikely to raise such funds on its own, it is suggested that they liaise with international donors to raise these funds.

<sup>1624</sup> Chapter 6 under 6.2 stating that government forces such as the *Forces Armees de la Republique Democratique du Congo* (FARDC) and the *Police Nationale Congolaise* (PNC) also rape civilians.

<sup>1625</sup> See chapter 6 relating to the Kavumu case where a successful application was made to change the initial prosecutor who did not want to prosecute the case.

<sup>1626</sup> The ICC has adopted this method. See ICC, Policy Paper on Sexual and Gender-Based Crimes, June 2014, paras 3 and 14 available at [www.icc-cpi.int/.../OTP-Policy-Paper-on-Sexual-and-Gender-Based-Cri...](http://www.icc-cpi.int/.../OTP-Policy-Paper-on-Sexual-and-Gender-Based-Cri...) (accessed on 25 October 2016).

3. Train court staff and judges to identify and be sensitive to gender issues before the court. Conduct periodical training on the application of the Rome Statute, international humanitarian law and international human rights law.
4. Draft a policy document on SGBCs and also a document defining the courts strategic plans in investigating and prosecuting SGBCs committed in armed conflicts.
5. Work closely with the ICC and international and national actors in the prosecution of SGBCs committed in armed conflicts at the international and domestic stages.<sup>1627</sup>
6. Ensure the protection of victims and witnesses.
7. Be judicially independent in making decisions, especially from those involving political decisions.
- 8.

### **7.3.4 CONCLUDING REMARKS**

This thesis considered the prosecution of perpetrators of SGBCs committed in armed conflict at the international, regional and domestic levels, giving consideration to whether each level of authority involved in prosecuting these crimes was equipped to do so; and by so doing to able bridge the impunity gaps in the system.

With the ICC's continuing prosecution of these crimes, and in the light of its policy paper on SGBCs, its strategic plan for 2016 to 2018, and its 2016 policy paper on case selection, it is likely that the impunity gap for these crimes will eventually be bridged at the international level. Given that the ICC is a court of last resort, states should assume responsibility in pursuing these offences. This thesis contends that although the Act implementing the Rome Statute into the DRC's domestic laws was passed in 2016, the impunity gap could be bridged at this level, if the recommendations given above are adhered to – although it may take a few years for significant convictions to be obtained. In the interim, assistance given by international actors to the mobile military courts has helped in starting to bridge this gap. At the regional level, with the adoption of Malabo Protocol in its present form, it is unlikely that these crimes involving heads of state and top governmental officials will be successfully prosecuted until the Protocol is redrafted to rectify this problem. Thus, further research is recommended for prosecuting heads of state and senior government officials for SGBCs committed in armed conflicts. Although the Rome Statute provides for their prosecution it is unlikely that they will be brought to justice whilst in

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<sup>1627</sup> Chapter 6 under 6.4.4.2.

power, unless states are willing to cooperate with the ICC for their arrest and surrender. Thus, research as to how this impunity gap can be addressed would be valuable.

This thesis concludes by reiterating the importance of victims of SGBV committed during armed conflicts obtaining justice at the international, regional and domestic levels. As stated by the Deputy High Commissioner for Human Rights in 2011, when referring to the plight of victims in the DRC: ‘We have heard so much about the mass rapes in the Congo but what has been missing is the voice of the victims . . . . The international community and concerned people go and listen to the victims’ horrendous stories but then what? What has become of their lives since?’<sup>1628</sup>

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<sup>1628</sup> OHCHR Reparations for sexual violence survivors in DRC (March 2011) available at <http://www.ohchr.org/EN/NewsEvents/Pages/ReparationsforsexualviolenceinDRC.aspx> (accessed on 16 June 2017).



## BIBLIOGRAPHY

### Books

- Ambos K (2017) Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M), in Werle G., Vormbaum M. (eds) *The African Criminal Court. International Criminal Justice Series*, vol 10. T.M.C. (Asser Press, The Hague).
- Askin K D (1997) *War crimes against women: Prosecution in international war crimes tribunals* (Martinus Nijhoff Publishers).
- Askin K D (2013) 'Treatment of Sexual Violence in armed conflicts: A historical perspective and the way forward' in Anne-Marie de Brouwer, Charlotte Ku et al (eds) *Sexual violence as an international crime: Interdisciplinary approaches*.
- Banda F (2008) 'Protocol to the African Charter on the Rights of Women in Africa' in Murray R and Evans M D (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (Cambridge University Press).
- Bassiouni M C (1999) *Crimes against Humanity in International Criminal Law* 2<sup>nd</sup> Revised Edition (Martinus Nijhoff Publishers).
- Brownmiller S (1975) *Against our will: Men, women and rape* (Simon & Schuster). Publishers).
- DeGuzman M M and Schabas W A (2012) 'Initiation of investigations and selections of cases' in Goran Sluiter (ed) *Towards codification of general rules and principles of international criminal procedure* available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1999003](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1999003) (accessed on 26 October 2016).
- Ferrales G and McElrath S M (2014) 'Beyond rape, reconceptualizing gender-based violence during warfare' in Rosemary Gartner and Bill McCarthy (eds) *The Oxford Handbook of Gender, Sex and Crime*, 673 (Oxford University Press).
- Holmes J T (2002) 'Complementarity: National courts versus the ICC' in Antonio Cassese, Paola Gaeta, John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A commentary* Vol 1 (Oxford University Press).
- Jacobs D 'A shifting scale of power: Who is in charge of the charges at the International Criminal Court and the uses of regulation 55' in William Schabas, Niamh Hayes and Yvonne McDermott (eds) *The Ashgate Research companion To International Criminal Law Critical Perspectives* (Routledge Publishers).

- Jallow H and Bensouda F 'International Criminal Law in an African context' in Max du Plessis (ed) *African Guide to International Criminal Justice* 15 (Institute for Security Studies).
- Kirsch P and Robinson D (2002) 'Referral by state parties' in Cassese A, Gaeta P and Jones J R W D (eds) *The Rome Statute of the International Criminal Court: A commentary* Vol. I (Oxford University Press).
- Lee R S 'The Rome Conference and the Contributions to International Law' in Lee R S (ed) *The International Criminal Court, The Making of the Rome Statute Issues, Negotiations, Results* (Martinus Nijhoff Publishers).
- Meron T (1998) 'The Normative Impact on International Law of the International Tribunal for Former Yugoslavia' in *War Crimes Law Comes of Age* (Oxford University Press).
- Meron T (1998) 'Rape as a Crime under International Humanitarian Law' in *War Crimes Law Comes of Age* (Oxford University Press).
- Moogato J (2009) 'The work of national military tribunals under Control Council Law 10' in J Doria et al (eds) *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers).
- Olasolo H and Carnero-Roto E (2011) 'The application of the principle of complementarity to the decision of where to open an investigation: The admissibility of 'situations'' in Stahn C and EL Zeidy M M (eds) *The International Criminal Court and Complementarity* Vol. I (Cambridge University Press).
- Pegorier C (2013) 'Denial, Impunity and Transitional Justice: The Fate of Female Rape Victims in Bosnia and Herzegovina' in L Yarwood (ed) *Women and Transitional Justice: The Experience of Women as Participants* (Routledge)
- Rastan R (2011) 'Situation and case: Defining the parameters' in Stahn C and EL Zeidy M M (eds) *The International Criminal Court and Complementarity*, Vol. I (Cambridge University Press).
- Roling B V A (1979) 'Aspects of the criminal responsibility for violations of the laws of war' in Cassese A (ed) *The New Humanitarian Law of Armed Conflict* (Oxford University Press).
- Sadat L N (2002) *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers).
- Schabas W A (2006) *The United Nations International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra-Leone* (Cambridge University Press).

- Schabas W A (2011) 'The rise and fall of complementarity' in Carsten Stahn and Mohamed M. EL Zeidy (eds) *The International Criminal Court and Complementarity* Vol. I (Cambridge University Press).
- Soh C S (2008) *The Comfort Women: Sexual Violence and Postcolonial memory in Korea and Japan* (University of Chicago, Press, Chicago).
- Steains C 'Gender Issues' in Roy S Lee (ed) *The International Criminal Court, The Making of the Rome Statute Issues, Negotiations, Results* (Martinus Nijhoff Publishers).
- Stiglmayer A (1994) 'The rapes in Bosnia-Herzegovina' in Stiglmayer A (ed) *Mass rape, the war against women in Bosnia-Herzegovina* (University of Nebraska Press, Lincoln and London).
- Stiglmayer A (1994) 'The war in the former Yugoslavia' in Alexandra Stiglmayer (ed) *Mass rape, the war against women in Bosnia-Herzegovina* (University of Nebraska Press, Lincoln and London).
- Turone G (2002) 'Powers and duties of the Prosecutor' in Cassese A, Gaeta P, Jones J R W D (eds) *The Rome Statute of the International Criminal Court: A commentary* Vol. II (Oxford University Press).

## **Journals and Papers**

- Abass A 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *The European Journal of International Law* 934.
- Abass A 'The proposed international criminal jurisdiction for the African Court: some problematical aspects' (2013) 60 *Netherlands International Law Review* 27.
- Akande D 'International law immunities and the International Criminal Court' (2004) 98 *The American Journal of International Law* 407.
- Akande D 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 333.
- Akande D 'The Bashir indictment: Are serving heads of state immune from ICC prosecution' (2008) available at <http://www.law.ox.ac.uk/sites/files/oxlaw/akande1.pdf> (accessed on 25 May 2016).
- Akande D and Shah S 'Immunities of state officials, international crimes, and foreign domestic courts' (2011) 21 *The European Journal of International Law* 815.
- Ambos K 'Critical issues in the Bemba confirmation decision' (2009) 22 *Leiden Journal of International Law* 715.

- Apiko P and Aggad F 'The International Criminal Court, Africa and the African Union: what way forward?' (2016) available at [www.ecdpm.org/wp-content/.../DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf](http://www.ecdpm.org/wp-content/.../DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf) (accessed on 23 February 2017).
- Aptel C 'Prosecutorial discretion at the International Criminal Court and victim's rights: Narrowing the impunity gap' (2012) 10 *Journal of International Criminal Justice* 1357.
- Argibay C M 'Sexual Slavery and the "Comfort Women" of World War II' (2003) 21 *Berkeley Journal of International Law* 375.
- Askin K D 'Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals: Current status' (1999) 93 *The American Journal of International Law* 97.
- Askin K D 'Comfort women – shifting shame and stigma from victims to victimizers' (2001) 1 *International Criminal Law Review* 5,
- Askin K D 'The quest for post-conflict gender justice' (2002 – 2003) 41 *Columbia Journal of Transnational Law* 509, 513.
- Askin K D 'Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advance, enduring obstacles, (2003) 21 *Berkeley Journal of International Law* 288.
- Askin K D 'A decade of the development of gender crimes in international courts and tribunals: 1993 to 2003' (2004) 11 *Human Rights Brief* 16.
- Askin K D 'Holding leaders accountable in the International Criminal Court for gender crimes committed in Darfur' (2006) 1 *Genocide Studies and Prevention* 13, 14.
- Balthazar S 'Gender Crimes and the International Criminal Tribunals' (2006) 10 *Gonzaga Journal of International Law* 43.
- Bassiouni M C 'The time has come for an International Criminal Court' (1991) 1 *Indianan International & Comparative Law Review*.
- Bassiouni M C 'From Versailles to Rwanda in seventy-five years: The need to establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal* 11.
- Bedont B and Hall-Martinez K 'Ending Impunity for Gender Crimes and the International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65.
- Bensouda F 'Reflections from the International Criminal Court Prosecutor' (2012) 45 *Case Western Reserve Journal of International Law* 505.
- Booth C and Du Plessis M 'The International Criminal Court and victims of sexual violence,' (2005) 18 *South African Journal of Criminal Justice* 241.

- Branch A 'Uganda's civil war and the politics of ICC intervention' (2007) 28 *Ethics & International Affairs* 179
- Branwell S 'Rape and sexual violence in the Democratic Republic of Congo: a case study of gender-based violence' (2010) *Journal of Gender Studies* 45.
- Breton-Le Goff G 'Ending Sexual Violence in the Democratic Republic of Congo' (2010) *Fletcher Forum of World Affairs* 13.
- Broache M P 'Bringing home Rome: Explaining the domestication of the Rome Statute in the International Criminal Court' (2010) 1 available at [www.ssrn.com/abstract=2659195](http://www.ssrn.com/abstract=2659195) (accessed on 16 March 2017).
- Brown A W and Grenfell L 'The international crime of gender-based persecution and the Taliban' (2003) 4 *Melbourne Journal of International Law* 347.
- Burke-White W W 'Regionalization of international criminal law enforcement: A preliminary exploration' (2003) 38 *Texas International Law Journal* 729.
- Burke-White W W 'Complementarity in practice: the International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 557.
- Burke-White W W 'Proactive complementarity: The International Criminal Court and national courts in the Rome System of international justice' (2008) 49 *Harvard International Law Journal* 48.
- Burke-White W W and Kaplan S 'Shaping the contours of domestic justice, The International Criminal Court and an admissibility challenge in the Uganda situation' (2009) 7 *Journal of International Criminal Justice* 257.
- Cahn N 'Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence' (2005) 1 *Stanford Journal of Civil Rights and Civil Liberties* 217.
- Campanaro J 'Women, war and international law: The historical treatment of gender-based war crimes' (2000-2001) 89 *Georgetown Law Journal* 2557.
- Carpenter R C 'Recognizing gender-based violence against civilian men and boys in conflict situations' available at [www.genderandsecurity.researchhubssrc.org/gender-based-violence-against-men.../attachment](http://www.genderandsecurity.researchhubssrc.org/gender-based-violence-against-men.../attachment) (accessed on 16 January 2015).
- Carson K E 'Reconsidering the theoretical accuracy and prosecutorial effectiveness of international tribunals' *ad hoc* approaches to conceptualizing crimes of sexual violence as war crimes, crimes against humanity and acts of genocide' (2012) 39 *Fordham Urban Law Journal* 1249.

- Cassese A 'When may senior state officials be tried for international crimes? Some comments on the Congo v Belgium case' (2002) 13 *EJIL* 853
- Charlesworth H 'Symposium on method in International Law, Appraising the methods of International Law: A Prospectus for readers' (1999) 93 *American Journal of International Law* 291.
- Chang M H and Barker R P 'Victor's justice and Japan's Amnesia: The Tokyo war crimes trial reconsidered' (2001) 19 *East Asia* 55.
- Chinkin C M 'Women's international tribunal on Japanese military sexual slavery' (2001) 95 *American Society of International Law* 335.
- Clark T H 'The Prosecutor of the International Criminal Court, amnesties, and the "Interests of justice": Striking a delicate balance.' (2005) 4 *Washington University Global Studies Law Review* 389.
- Cohen L A 'Application of the realists and liberal perspectives to the implementation of war crimes trials: Case studies of Nuremberg and Bosnia' (1997) 2 *UCLA Journal of International Law and Foreign Affairs* 113.
- Cole A 'Prosecutor v Gacumbitisi: The New Definition for Prosecuting Rape under International Law' (2008) 8 *International Criminal Law Review* 55.
- Copelon R 'Surfacing gender: Re-engraving crimes against women in Humanitarian Law' (1994) 5 *Hastings Women's Law Journal* 243.
- Copelon R 'Gender crimes as war crimes: Integrating crimes against women into international criminal law' (2000-2007) 46 *McGill Law Journal*. 217
- Danner A M 'Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in prosecuting war and terrorism' (2005-2006) 46 *Virginia Journal of International Law* 83.
- DeGuzman M M 'Gravity and the legitimacy of the International Criminal Court' (2008 – 2009) 32 *Fordham International Law Journal* 1400.
- DeGuzman 'Choosing to prosecute: Expressive selection at the International Criminal Court' (2011 -2012) 33 *Michigan Journal of International Law* 265.
- Dormann K 'War crimes under the Rome Statute of the International Criminal Court with special focus on the negotiations on the elements of crimes' (2003) 7 *Max Planck Yearbook of the United Nations Law* 341
- Drom E V 'Assessment of the 2000 Tokyo Women's International War Crimes Tribunal on Japan's Military Sexual Slavery' available at [www.ronsyu.hannan-u.ac.jp/open/n002107.pdf](http://www.ronsyu.hannan-u.ac.jp/open/n002107.pdf) (accessed on 14 January 2015).

- Du Plessis M 'Implications of the African Union decision to give the African Court jurisdiction over international crimes' (2012) 235 *Institute for Security Studies Paper* 1.
- Du Plessis M, Louw A and Maunganidze O 'African efforts to close the impunity gap, Lessons for complementarity from national and regional actions' (2012) 241 *Institute for Security Studies Papers*.
- Du Plessis M, Maluwa T and O'Reilly A 'Africa and the International Criminal Court' (2013) available at [https://www.chathamhouse.org/sites/files/.../International%20Law/0713pp\\_iccafrica.p](https://www.chathamhouse.org/sites/files/.../International%20Law/0713pp_iccafrica.p) (accessed on 2 May 2016).
- Du Plessis M 'Shambolic, shameful and symbolic: Implications of the African Unions immunity for African leaders' (2014) 278 *Institute for Security Studies* 1.
- Dyani N 'Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict' (2006) 6 *African Human Rights Law Journal* 166.
- Ellis M 'Breaking the silence: Rape as an international crime' (2006-2007) 38 *Case Western Reserve Journal of International Law* 225.
- Erdei I 'Cumulative convictions in international criminal law: Reconsideration of a seemingly settled issue' (2011) 34 *Suffolk Transnational Law Review* 317.
- Ferencz B B (1998) 'International Criminal Courts: The legacy of Nuremberg' 10 *Pace International Law Review* 203.
- Franke K M 'Gendered subjects of transitional justice' (2006) 15 *Columbia Journal of Gender & Law* 813.
- Gaeta P 'Is the practice of "self-referrals" a sound start for the ICC' (2004) 2 *Journal of International Criminal Justice* 949.
- Gaeta P 'Does President Al-Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315.
- Green L 'First-class crimes, second-class justice: Cumulative charges for gender-based crimes at the International Criminal Court' (2011) 11 *International Criminal Law Review* 529.
- Groome D 'No witness, no case: An assessment of the conduct and quality of the International Criminal Court investigations' (2014) 3 *Penn State Journal of Law and International Affairs* 1.
- Goldstone R J 'Prosecuting rape as a war crime' (2009) 34 *Case W Res Journal International Law* 227



- Goldston J A 'More candour about criteria, the exercise of discretion by the Prosecutor of the International Criminal Court' (2010) 8 *Journal of International Criminal Justice* 383.
- Hale C K 'Does the evolution of international criminal law end with the ICC? The "Roaming ICC": A model International Criminal Court for a state-centric world of international law' (2006-2007) 35 *Denver Journal of International Law and Policy* 429.
- Halley J 'Rape at Rome: Feminist interventions in the criminalization of sex-related violence in positive international criminal law' (2008) 30 *Michigan Journal of International Law* 1.
- Hamid N 'The Untold Story of the Girl Soldiers of the Congo: The International Criminal Court Case of the Prosecutor v Lubanga' 1 available at <https://cdn.auckland.ac.nz/assets/humanrights/.../Noor-Hami-final.pdf> (accessed on 17 February 2015).
- Heller K J 'The shadow side of complementarity, the effect of article 17 of the Rome Statute on national due process' (2006) 17 *Criminal Law Forum* 255.
- Jalloh C 'Regionalizing International Criminal Law?' (2009) 9 *International Criminal Law Review* 445
- Kaul H 'The International Criminal Court (Current challenges and perspectives)' 2011 *Salzburg Law School on International Criminal Law* 1.
- Kindiki K 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal (2003) 3 *African Human Rights Law Journal* 97.
- King E B L 'Does justice always require prosecution? The International Criminal Court and transitional justice measures' (2013) 45 *The George Washington International Law Review* 85.
- Kioko B 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 807.
- Lee S R 'Comforting the comfort women: Who can make Japan pay?' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 509.
- Lincoln R S 'Too Rough a Justice: The Ethiopia-Eritrea Claims Commission and International Civil Liability for Claims for Rape under International Humanitarian Law' (2012) 20 *Tulane Journal of International and Comparative Law* 385



- Lindsay V C 'A review of International Criminal Court proceedings under Part V of the Rome Statute (investigation and prosecution) and proposals for amendments' (2010) *Revue Quebecoise de Droit International* 165.
- Lippman 'Nuremberg: Forty Five Years Later' (1991-1992) 7 *Connecticut Journal of International Law* 1.
- Luping D 'Investigation and prosecution of sexual and gender-based crimes before the International Criminal Court' (2009) 17 *American University Journal of Gender Social Policy & Law* 431.
- Mackinnon C A 'The ICTR's Legacy on Sexual Violence' (2008) 14 *New England Journal of International and Comparative Law* 211
- Maluwa T 'Ratification of African Union treaties by member states: Law, policy and practice' (2012) 13 *Melbourne Journal of International Law* 1
- Manjoo R & McRaith C 'Gender-based violence and justice in conflict and post-conflict areas' (2011) 44 *Cornell International Law Journal* 11, 14.
- Maravilla C S 'Rape as a War Crime: The Implications of the International Criminal Tribunal for Yugoslavia's decision in Prosecutor v Kunarac, Kovac, Vukovic on International Humanitarian Law' (2000-2001) 13 *Florida Journal of International Law* 321.
- Marquardt P D 'Law without borders: The constitutionality of the International Criminal Court' (1995) 33 *Columbia Journal of Transnational Law* 73.
- Matsui Y 'Overcoming the culture of impunity for wartime sexual violence - The historical significance of the Women's International War Crimes Tribunal 2000' available at <http://www1.jca.apc.org/vaww-net-japan/english/worr> (accessed on 14 January 2015).
- Meger S 'Rape of the Congo: Understanding sexual violence in the conflict in the Democratic Republic of Congo' (2010) 28:2 *Journal of Contemporary African Studies* 119.
- Meron T 'Editorial comment: Rape as a crime under international humanitarian law' (1993) 87 *American Journal of International Law* 424.
- Meron T 'The International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554.
- Meron T 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100 *American Journal of International Law* 551.

- Mitchell D S 'The prohibition of rape in international humanitarian law as a norm of jus cogens: Clarifying the doctrine' (2005) 15 *Duke Journal of Comparative & International Law* 219.
- Moreno-Ocampo L 'Keynote address: Integrating the work of the International Criminal Court into local justice initiatives' (2005) 21 *American University International Review* 497.
- Mosham B 'Women, war and words: The gender component in the Permanent International Criminal Courts definition of crimes against humanity' (1998-1999) 22 *Fordham International Law Journal* 154.
- Mullins C W 'He would kill me with his penis, genocidal rape in Rwanda as a state crime' (2009) 17 *Critical Criminology* 15, 28.
- Murithi T 'The African Union and the International Criminal Court: An embattled relationship?' (2013) 8 *Policy Brief* 1.
- Murungu C B 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067.
- Niarchos C N 'Women, war and rape: Challenges facing The International Tribunal for the former Yugoslavia' (1995) 17 *Human Rights Quarterly* 649.
- Nouwen S M H and Werner W G 'Doing justice to the political: The International Criminal Court in Uganda and Sudan' (2011) 21 *The European Journal of International Law* 941.
- Nowojee B "'Your justice is too slow": Will the ICTR fail Rwanda's rape victims?' (2005) available at [www.kmsl.isn.ethz.ch/serviceengine/Files/ISN/38760/.../op%2B010.pdf](http://www.kmsl.isn.ethz.ch/serviceengine/Files/ISN/38760/.../op%2B010.pdf) (accessed on 2 February 2015).
- Obote-Odora A 'Rape and Sexual Violence in International Law: International Criminal Tribunal for Rwanda' (2005) 12 *New England Journal of International and Comparative Law* 135.
- Oloka-Onyango J 'Human rights and sustainable development in contemporary Africa: A new dawn or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 39.
- Oosterveld V, Perry M and McManus J 'The cooperation of states within the International Criminal Court' (2001) 25 *Fordham International Law Journal* 765.
- Oosterveld V 'The definition of "Gender" in the Rome Statute of the International Criminal Court: A step forward or back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55.

- Oosterveld V 'Gender persecution and the International Criminal Court: Refugee law's relevance to the crime against humanity of gender-based persecution' (2006) 17 *Duke Journal of Comparative and International Law* 49.
- Oosterveld V 'Gender-sensitive justice and the International Criminal Tribunal for Rwanda: Lessons learned for the International Criminal Court' available at [www.peacewomen.org/assets/file/PWandUN/.../itrc\\_oosterveld\\_2005.pdf](http://www.peacewomen.org/assets/file/PWandUN/.../itrc_oosterveld_2005.pdf) (accessed on 13 March 2016).
- Palmer A 'An Evolutionary Analysis of Gender-Based War Crimes and The Continued Tolerance of 'Forced Marriage' (2009) 7 *Northwestern University Journal of International Human Rights* 133.
- Peterman A, Palermo T and BredenKamp C 'Estimates and determinants of sexual violence against women in the Democratic Republic of Congo (2011) 101(6) *American Journal of Public Health* 1060.
- Phelps A R 'Gender-based War Crimes: Incidence and Effectiveness of International Criminal Prosecution' (2006) 12 *William & Mary Journal of Women and the Law* 499.
- Picart C J K S 'Attempting to go beyond forgetting: The legacy of the Tokyo International Military Tribunal and crimes of violence against women' (2012) 7 *East Asia Law Review* 1.
- Pillay N 'Sexual Violence: Standing by the victim' (2009 -2010) 42 *Case Western Reserve Journal of International Law* 459, 460
- Pratt K M and Fletcher L E 'Time for Justice: The Case for the International Prosecutions of Rape and Gender-based Violence in the former Yugoslavia' (1994) 9 *Berkeley Women's Law Journal* 77.
- Pritchett S 'Entrenched hegemony, efficient procedure or selective justice? An inquiry into charges for gender-based violence at the International Criminal Court.' (2008) 17 *Transnational Law and Contemporary Problems* 265.
- Rastan R 'What is a 'case' for the purpose of the Rome Statute' (2008) 19 *Criminal Law Forum* 435.
- Rau K 'Jurisprudential innovation or accountability avoidance? The International Criminal Court and proposed expansion of the African Court of Justice and Human Rights' (2012) 97 *Minnesota Law Review* 669.
- Ray A E 'The Shame of it: Gender-Based Terrorism in the Former Yugoslavia and the failure of International Human Rights Law to Comprehend the Injuries' (1997) 46 *The American University Law Review* 793.

- Robinson D 'The controversy over territorial state referrals and reflections on the ICL discourse.' (2011) 9 *Journal of International Criminal Justice* 355.
- Rosenberg S 'The International Criminal Court in Cote d'Ivoire, Impartiality at Stake?' (2017) 15 *Journal of International Criminal Justice* 471
- Ryan A A 'Nuremberg's Contribution to International Law' (2007) 30 *Boston College International and Comparative Law Review* 55.
- Ryngaert C 'Applying the Rome Statutes complementarity principle: Drawing lessons from the prosecution of core crimes by states acting under the universality principle' (2008) 19 *Criminal Law Reform* 153.
- SaCouto S and Cleary K 'The Women's Protocol to the African Charter and sexual violence in the context of armed conflict or other mass atrocity' (2009) 16 *Washington & Lee Journal of Civil Rights & Social Justice* 173.
- Sacouto S and Cleary K 'The importance of effective investigation of sexual violence and gender-based crimes at the International Criminal Court' (2009) 17 *American University Journal of Gender, Social Policy and the Law* 337.
- Sacouto S 'International law weekend, American Branch of the International Law Association Perspectives on crimes of sexual violence in international law' (2012 – 2013) 19 *ILSA Journal of International & Comparative Law* 263.
- Schaack B V 'The definition of Crimes Against Humanity: Resolving the incoherence' (1998) 37 *Columbia Journal of Transnational Law* 787
- Schaack B V 'Obstacles on the road to gender justice: The International Criminal Tribunal for Rwanda as object lesson' (2009) 17 *American Journal of Gender, Social Policy & the Law* 361, 363-364.
- Schaack B V 'Engendering genocide: The Akayesu case before the International Criminal Tribunal for Rwanda' (2008) available at <http://digitalcommons.law.scu.edu/facpubs/629> (accessed on 16 January 2015).
- Schabas W A 'Prosecutorial discretion v judicial activism' (2008) 6 *Journal of International Criminal Justice* 731.
- Schabas W A 'Complementarity in practice': Some uncomplimentary thoughts' (2008) 19 *Criminal Law Forum* 5.
- Schabas W A 'Victor's justice: Selecting situations at the International Criminal Court' (2009 – 2010) 43 *John Marshall Law Review* 535. Sellers P V 'The culture value of sexual violence' (1999) 93 *American Society of International Law Proceedings* 312.

- Schomburg W and Paterson I 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 *American Journal of International Law* 121.
- Scully P 'Vulnerable women: A critical reflection on human rights discourse and sexual violence' (2009) 23 *Emory International Law Review* 113.
- Sellers K 'Imperfect justice at Nuremberg and Tokyo' (2010) 21 *European Journal of International Law* 1085.
- Sellers P V 'The culture value of sexual violence' (1999) 93 *American Society of International Law Proceedings* 312.
- Sellers P V 'Gender strategy is not a luxury for international courts' (2009) 17 *American Journal of Gender Social Policy & the Law* 301.
- Sellers P V 'The prosecution of sexual violence in conflict: The importance of human rights as means of interpretation' available at <http://www.PVSellers-2012-zh.unrol.org> (accessed on 14 January 2015).
- Sirleaf M V S 'Regionalism, regime complexes and the crisis in international criminal justice' (2016) 54 *Columbia Journal of Transnational Law* 699.
- Sirleaf M V S 'The African Justice Cascade and the Malabo Protocol' (2017) 11 *International Journal of Transitional Justice* 1.
- Sivakumaran S 'Sexual violence against men in armed conflict' (2007) 18 *European Journal of International Law* 253-276.
- Swaak-Goldman O 'Prosecutor v Delalic No. IT-96-21-T' (1999) 93 *The American Journal of International Law* 514.
- Tladi D 'The immunity provision in the AU amendment protocol and the entrenchment of the hero-villain trend' (2015) 13 *Journal of International Criminal Justice* 1,
- Udombana N J 'Can these dry bones live? In search of a lasting therapy for AU and ICC toxic relationship' (2014) *African Journal of International Criminal Justice* 57.
- Wardle P 'The survival of Head of State immunity at the International Criminal Court' (2011) 18 *Australian International Law Journal* 181.
- Wanhong Z 'From Nuremberg to Tokyo: Some Reflections on the Tokyo trial (on the sixtieth anniversary of the Nuremberg trials)' (2005-2006) 27 *Cardozo Law Review* 1673.
- Whiting A 'Dynamic investigative practice at the International Criminal Court' (2013) 76 *Law and Contemporary Problems* 163.

- Willmott D 'Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court' (2004) 5 *Melbourne Journal of International Law* 1
- Wood S 'A woman scorned for the 'Least condemned' war crime: Precedent and problems with prosecuting rape as serious war crime in the International Criminal Tribunals for Rwanda.' (2004) 13 *Columbia. Journal of Gender and Law* 274.
- Wood E J 'Variation in sexual violence during war' (2006) 34 *Politics & Society* 307
- Yasuaki O 'The Tokyo Trial: Between Law and Politics' available at [www.olemiss.edu/courses/inst203/onuma86.pdf](http://www.olemiss.edu/courses/inst203/onuma86.pdf) (accessed on 15 January 2015).
- Zongwe D P 'Taking leaves out of the International Criminal Court Statute: The direct application of international criminal law by military courts in the Democratic Republic of Congo' (2013) 46 *Israel Law Review* 249.

## International Treaties and Declarations

- 1863 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863 available at <https://www.icrc.org/ihl/INTRO/110?OpenDocument> (accessed on 10 January 2015).
- 1907 Convention respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 available at <https://www.icrc.org/applic/ihl/.../1d1726425f6955aec125641e0038bfd6> (accessed on 10 January 2015).
- 1929 Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929 available at <https://www.icrc.org/ihl/INTRO/305?OpenDocument> (accessed on 10 January 2015).
- 1945 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany (1946) available at <https://www1.umn.edu/humanrts/instree/ccno10.htm> (accessed on 14 January 2015).
- 1945 United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis, ("London Agreement"), 8 August 1945, 82 U.N.T.S 280 available at <http://www.refworld.org/docid/47dfb34.html> (accessed on 14 January 2015).
- 1945 United Nations Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, 82 UNTS 279, 59 Stat., available at <http://www.refworld.org/docid/3ae6b39614.html> (accessed on 14 January 2015).

- 1948 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
- 1949 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949.
- 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 6 UST 3516, 75 UNTS 287 available at <https://www.icrc.org/ihl/.../6756482d86146898c125641e00aa3c5> (accessed on 12 January 2015).
- 1951 Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 UNTS 277, entered into force 12 January 1951.
- 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 available at <https://www.icrc.org/ihl/intro/490> (accessed on 12 January 2015).
- 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 available at <https://www.icrc.org/ihl/INTRO/475?OpenDocument> (accessed on 12 January 2015).
- 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, adopted 10 December 1984, entered into force 26 June 1987.
- 1993 UN General Assembly, Vienna Declaration and Programme of Action (12 July 1993) UN Doc. A/CONF.157/23.
- 1993 Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against Women (Eleventh Session, 1992), U. N. Doc. A/47/38 at 1 (1993).
- 1998 Rome Statute to the International Criminal Court, 17 July 1998, UN Doc A/CONF 183/9:37 ILM 1002 (1998); 2187 UNTS 90.
- 1999 United Nations Security Council, Lusaka Agreement (S/1999/815, 10 July 1999) available at: [www.securitycouncilreport.org/un-documents/document/rol-s1999-815.php](http://www.securitycouncilreport.org/un-documents/document/rol-s1999-815.php) (accessed on 31 August 2016).
- 2002 The Pretoria Agreement (30 July 2002) available at: <http://www.irinnews.org/report/33230/drc-rwanda-text-pretoria-memorandum-understanding> (accessed on 31 August 2016).



- 2002 The Luanda Agreement (6 September 2002) available at:  
[www.beyondjuba.org/BJP1/.../Ug\\_gov\\_and DR Congo\\_gov\\_security\\_agreement.pdf](http://www.beyondjuba.org/BJP1/.../Ug_gov_and_DR Congo_gov_security_agreement.pdf)  
(accessed on 31 August 2016).
- 2003 The Final Act (Sun City Agreement) available at [www.peacemaker.un.org/drc-suncity-agreement2003](http://www.peacemaker.un.org/drc-suncity-agreement2003) (accessed on 31 August 2016).
- 2002 United Nations Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002.
- 2004 Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).
- 2009 Goma Peace Agreement (23 March 2009) available at  
[www.friendsofthecongo.org/images/pdf/cndp\\_accord.pdf](http://www.friendsofthecongo.org/images/pdf/cndp_accord.pdf) (accessed on 31 August 2016).

## **International Reports and Resolutions**

### **U.N. Secretary-General**

- 1998 Report of the Secretary-General to the United Nations Security Council titled ‘The causes of conflict and the promotion of durable peace and sustainable development in Africa’, (A/52/871 – S/1998/318, 13 April 1998).
- 1999 Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda available at [www.cfr.org/rwanda/.../report-independent-inquiry-into-actions...rwanda/...](http://www.cfr.org/rwanda/.../report-independent-inquiry-into-actions...rwanda/...) (accessed on 14 January 2015).
- 2014 Report of the Secretary-General on conflict related sexual violence (S/2014/181, 13 March 2014).
- 2015 Report of the Secretary-General on conflict related sexual violence (S/2015/203, 23 March 2015).
- 2016 Report of the Secretary-General on conflict related sexual violence (S/2016/361, 20 April 2016).
- 2017 Report of the Secretary-General on conflict related sexual violence’ (S/2017/249, 15 April 2017).

### **United Nations Security Council Resolutions**

Resolution 808 (1993) adopted 22 February 1993.



Resolution 955(1994) adopted 8 November 1994.

Resolution 1325(2000) adopted 31 October 2000.

Resolution 1564(2004) adopted 18 September 2004.

Resolution 1593(2005) adopted 31 March 2005.

Resolution 1820(2008) adopted 19 June 2008.

Resolution 1325 (2000) adopted 31 October 2000.

Resolution 1820 (2008) adopted 19 June 2008.

Resolution 1888 (2000) adopted 30 September 2009.

Resolution 1970 (2011) adopted 26 February 2011.

Resolution 2106(2013) adopted on 24 June 2013.

Resolution 2277 (2016) adopted 30 March 2016.

### **General Assembly**

1946 General Assembly Resolutions 1st Sessions available at [www.un.org/documents/ga/res/1/ares1.htm](http://www.un.org/documents/ga/res/1/ares1.htm) (accessed on 15 January 2015).

1993 UN General Assembly, Vienna Declaration and Programme of Action (12 July 1993) UN Doc. A/CONF.157/23.

1993 UN General Assembly, Declaration on the Elimination of Violence against Women (29 December 1993) A/RES/48/104 available at <http://www.refworld.org/docid/3600f25d2c.html> (accessed on 12 January 2015).

### **United Nations Office of the High Commissioner for Human Rights (OHCHR)**

2011 Report of the panel on remedies and reparations for victims of sexual violence in the Democratic Republic of Congo to the High Commissioner for Human

2011 Reparations for sexual violence survivors in DRC available at <http://www.ohchr.org/EN/NewsEvents/Pages/ReparationsforsexualviolenceinDRC.aspx> (accessed on 16 June 2017).

2014 Sexual and gender-based violence in the context of transnational justice (October 2014) available at [http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual\\_and\\_gender-based\\_violence.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender-based_violence.pdf) (accessed on 2 February 2015).

- 2014 Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo (April 2014) available at:  
<https://www.hrw.org/reports/2002/drc/Congo0602.pdf> (accessed on 30 August 2016).
- 2014-2016 Accountability for human rights violations and abuses in the DRC: Achievements, challenges and way forward (January 2014 - March 2016).

## **International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East**

- 1945 Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945,  
[http://www.loc.gov/rr/frd/military\\_Law/pdf/jackson-rpt-military-trials.pdf](http://www.loc.gov/rr/frd/military_Law/pdf/jackson-rpt-military-trials.pdf).(accessed on 15 January 2015).
- 1945 First Instrument of Surrender, 2 September 1945  
[www.taiwodocuments.org/surrender01.htm](http://www.taiwodocuments.org/surrender01.htm) (accessed on 14 January 2015).
- 1945-1948 U S Department of State Office of the Historian, The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948) available at  
<http://history.state.gov/milestones/1945-1952/nuremberg> (accessed on 14 January 2015).
- 1945 Communique on the Moscow Conference of the three foreign ministers, signed at Moscow on 27 December 1945, and report of the meeting of the ministers of foreign affairs of the Union of the Soviet Socialist Republic, The United States of America and The United Kingdom, dated 26 December 1945, together constituting an agreement relating to the preparation of Peace Treaties and to certain other problems available at  
[www.ungarisches-institut.de/dokumente/pdf/19451227-1.pdf](http://www.ungarisches-institut.de/dokumente/pdf/19451227-1.pdf) (accessed on 14 January 2015).
- 1946 International Military Tribunal (Nuremberg) Judgment of 1 October 1946 available at  
[http://www.crimeofaggression.info/documents/6/1946\\_Nuremberg\\_Judgment.odf](http://www.crimeofaggression.info/documents/6/1946_Nuremberg_Judgment.odf)  
 (accessed on 15 January 2015).
- 1946 Charter of the International Military Tribunal for the Far East, dated at Tokyo January 19, 1946, amended April 26, 1946, TIAS 1589: 4 Bevans 20.
- 1948 International Military Judgment of 4 November, 1948 available at  
<http://crimeofaggression.info/2013/01/international-mi..> (accessed on 14 January 2015).
- Potsdam Declaration  
[www.princeton.edu/~achaney/tmve/wik/100k/.../potsdam\\_Declaration.ht...](http://www.princeton.edu/~achaney/tmve/wik/100k/.../potsdam_Declaration.ht...) (accessed on 14 January 2015).

Judgment International Military Tribunal for the Far East Indictment available at <http://www.werle.rewi.hu.berlin.de/tokyo.anklageschrift.pdf> (accessed on 14 January 2015).

International Military Tribunal for the Far East, Dissident Judgment of Justice Pal, Kokusho – Kankokai, Inc., Tokyo, 1999 available at [www.cwporter.com/pal1.htm](http://www.cwporter.com/pal1.htm) (accessed on 16 January 2015).

## **International Criminal Tribunal for Yugoslavia**

UN Security Council Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Res. 808 (1993).

Statute of the International Tribunal for the former Yugoslavia, SC res 827, U N SCOR, 48<sup>th</sup> Sess, 3217<sup>th</sup> mtg, at 1-2 (1993), 32 ILM 1159 (1993).

*Prosecutor v Zlatko Aleksovski*

ICTY (Appeals Chamber Judgment) Case, No. IT-95-14/1-A, March 24, 2000

*Prosecutor v Delialic, Mucic, Delic and Landzo* (also known as the *Celebici* case)

ICTY (Trial Chamber Judgment) Case No.IT-96-21-T, Nov. 16, 1998.

*Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*

ICTY (Trial Chamber Judgment), Case No.IT-96-23-T and IT-96-23/1-T, February 22, 2001.

ICTY (Appeals Chamber Judgment) Case No. IT-96-23/1-A, June 12, 2002,

*Prosecutor v Furundzija,*

ICTY (Trial Chamber Judgment) Case No IT-95-17/1/T, Dec 19, 1998.

*Prosecutor v Dragan Nikolic*

ICTY, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61, Oct 29, 1995.

*Prosecutor v Dusko Tadic*

ICTY (Appeals Chamber) Decision on the defence motion for interlocutory appeal on jurisdiction, Case No IT-94-1-A, Oct 2, 1995.

ICTY (Appeals Chamber Judgment) Case No IT-94-1-A, July 15, 1999.

## **International Criminal Tribunal for Rwanda**

United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda (with Annexed Statute) S.C. res 955, U. N. SCOR, 49<sup>th</sup>Sess, 3453<sup>rd</sup>mtg. Annex, U.N. Doc S/RES/955 ( Nov. 8, 1994).

Statute of the International Tribunal for Rwanda, SC res 995, U.N. SCOR, 49<sup>th</sup> Sess., 3453 mtg., U.N. Doc S/RES/955 (1994); 33 ILM 1598 (1994).

*Prosecutor v Akayesu*

ICTR (Trial Chamber Judgment) Case No ICTR-96-4, Sept 2, 1998.

*Gacumbitsi v Prosecutor*

ICTR (Trial Chamber Judgment) Case No. ICTR- 2001-64-T, June 17, 2004.

ICTR (Appeals Chamber Judgment) Case No. ICTR-2001-64-A, July 7, 2006.

*Prosecutor v Kajelijeli*

ICTR (Trial Chamber Judgment and Sentence) Case No. ICTR 98-44A-T, December 1, 2003

*Prosecutor v Muhimana*

ICTR (Trial Chamber Judgment) Case No. ICTR-95-IB-T, April 28 2005.

*Prosecutor v Alfred Musema*

ICTR (Judgment and Sentence) Case No. ICTR-96-13-A, January 27, 2000.

ICTR (Appeal Judgment) Case No. ICTR-96-13-A, 16 November, 2001.

*Prosecutor v Semanza*

ICTY (Judgment and Sentence) Case No. ICTR-97-20-T, May 15, 2003.

## **International Criminal Court Cases**

*The Presidency*

Situation in the Democratic Republic of Congo, Decision assigning the situation in The Democratic Republic of Congo to the Pre-Trial Chamber I (5 July 2004) ICC-01/04.

Situation in The Central African Republic, Decision assigning the situation in The Central African Republic to Pre-Trial Chamber III (19 January 2005) ICC-01/05.

Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation (19 March 2009) ICC-Pres-01-09.

Public, Decision reconstituting Pre-Trial Chamber II (29 April 2009) ICC-Pres-02-09.

*Pre-Trial Chamber*

Pre-Trial Chamber II, Situation in Uganda, Warrant of arrest for Dominic Ongwen (8 July 2005) ICC-02/04.

Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, (17 January 2006) ICC-01/04.

Pre-Trial Chamber II, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, (31 March 2010) ICC-01/09.

Pre-Trial Chamber I, Situation in Georgia ‘Decision on the Prosecutor’s request for authorisation of an investigation’ (27 January 2016) ICC-01/15.

*Prosecutor v Omar Hassan Ahmed Al-Bashir*

Pre-Trial Chamber I, First warrant of arrest for Omar Hassan Ahmed Al-Bashir, (4 March 2009) ICC-02/05-01/09-1.

Pre-Trial Chamber II, Decision on the cooperation of the Democratic Republic of Congo regarding Omar Al Bashir’s arrest and surrender to the Court (9 April 2014) ICC-02/05-01/09.

Pre-Trial Chamber I, Second warrant of arrest for Omar Hassan Ahmed Al-Bashir (12 July 2010) ICC-02/05-01/09-95.

Pre-Trial Chamber I, Second decision on the Prosecution’s application for a warrant of arrest (12 July 2010) ICC-02/05-01/09.

Pre-Trial Chamber I, Decision pursuant to article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with request to the arrest and surrender of Omar Hassan Ahmad Al Bashir, (12 December 2011) ICC-02/05-01/09. PTC I.

Pre-Trial Chamber I, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmed Al Bashir (13 December 2011) ICC-02/05-01/09.

Pre-Trial Chamber II, Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir, (6 July 2017) ICC-02/05-01/09.

Appeals Chamber, The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir." (12 March 2018) ICC-02/05-01/09.

*Prosecutor v Mathieu Ngudjolo Chui*

Pre-Trial Chamber I, Warrant of arrest for Mathieu Ngudjolo Chui (6 July 2007) ICC-01/04-02/07.

Trial Chamber II, Judgment pursuant to article 74 of the Statute (18 December 2012) ICC-01/04-02/12.

*Prosecutor v Thomas Lubanga Dyilo*

Pre-Trial Chamber I, Warrant of arrest, (10 February 2006) ICC-01/04-01/06.

Pre-Trial Chamber I, Decision on the Prosecutor's Application for a warrant of arrest (10 February 2006) ICC-01/04-01/06.

Pre-Trial Chamber I, Prosecutor's information on further information (28 June 2006) ICC-01/04-01/06.

Pre-Trial Chamber I, Document containing the charges, article 61(3)(a) (28 August 2006) ICC-01/04-01/06.

Pre-Trial Chamber I, Decision on the confirmation of charges (29 January 2007) ICC-01/04-01/06.

Trial Chamber I, Prosecution's provision of the amended document containing the charges, (23 December 2008) ICC-01/04-01/06.

Trial Chamber I, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court, (14 July 2009) ICC-01/04-01/06.

Trial Chamber I, minority opinion on the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court' (17 July 2009) ICC-01/04-01/06.

Trial Chamber I, Prosecution's application for leave to appeal the 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with regulations 55(2) of the Regulations of the Court' (12 August 2009) ICC-01/04-01/06.

Trial Chamber I, Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court (27 August 2009) ICC-01/04-01/06.

Appeals Chamber, Judgment on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulation of the Court,' (8 December 2009) ICC-01/04-01/06 OA 15 OA 16.

Trial Chamber I, 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04-01/06.

Trial Chamber I, Decision on sentence pursuant to article 76 of the Statute (10 July 2012) ICC-01/04-01/06.

Trial Chamber I, Decision on sentence pursuant to article 76 of the Statute, Dissenting Opinion of Judge Odio Benito, (10 July 2012) ICC-01/04-01/06.

Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction (1 December 2014) ICC-01/04-01/06 A 5.

Trial Chamber I ‘Decision establishing the principles and procedures to be applied to reparations’ (7 August 2012) ICC-01/04-01/06.

Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo against the ‘Decision in Sentence pursuant to Article 76 of the Statute,’ (1 December 2014) ICC-01/04-01/06 A 4 A 6.

Appeals Chamber Judgment on the appeals against the ‘Decision establishing the principle and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2 (3 March 2015) ICC-01/04-01/06 A A 2 A 3, 3.

*Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*

Decision on the admissibility of the case against Saif Al-Islam Gaddafi (31 May 2013) ICC-01/11-01/11.

*Prosecutor v Laurent Gbagbo*

Pre-Trial Chamber I, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute.

Pre-Trial Chamber I, Decision on the confirmation of charges against Laurent Gbagbo (12 June 2014) ICC-02/11-01/11.

*Prosecutor v Jean-Pierre Bemba Gombo*

Pre-Trial Chamber III, Warrant of arrest for Jean-Pierre Bemba Gambo (23 May 2008) ICC-01/05-01/08.

Pre-Trial Chamber III, Warrant of arrest for Jean-Pierre Bemba Gambo replacing the warrant of arrest issued on 23 May 2008 (10 June 2008) ICC-01/05-01/08.

Pre-Trial Chamber II, Prosecution’s submission of Amended Document Containing the Charges, amended list of evidence and amended in-depth analysis chart of incriminatory evidence (30 march 2009) ICC-01/05-01/08.

Pre-Trial Chamber II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gambo (15 June 2009) ICC-01/05-01/08.

Pre-Trial Chamber II, Prosecutions application for leave to appeal the decision pursuant to article 61(7)(a) and (b) on the charges against Jean-Pierre Bemba (22 June 2009) ICC-01/05-01/08.

Pre-Trial Chamber II, Amicus Curiae Observations of the Women’s Initiatives for Gender Justice pursuant to rule 103 of the Rules of Procedure and Evidence (31 July 2009) ICC.

Trial Chamber III, Decision on the admissibility and abuse of process challenges (24 June 2010) ICC-01/05-01/08

Pre-Trial Chamber II, Decision in the Prosecutor's application for leave to appeal the 'Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba,' (18 September 2009) ICC-01/05-01/08.

Trial Chamber III, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court (21 September 2012) ICC-01/05-01/08.

Trial Chamber III, Defence submissions on the Trial Chamber's notification under regulation 55(2) of the Regulations of the Court (18 October 2012) ICC-01/05-01/08.

Trial Chamber III, Decision on the temporary suspension of the proceedings pursuant to regulation 55(2) of the Regulations of the Court and related procedural deadlines (13 December 2012) ICC-01/05-01/08.

Trial Chamber III, Defence Motion to vacate Trial Chamber's 'Decision on the temporary suspension of the proceedings' of 13 December 2012 and notification regarding the envisaged re-qualification of charges pursuant to regulation 55 (28 January 2013) ICC-01/05-01/08.

Trial Chamber III, Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions (6 February 2013) ICC-01/05-01/08.

Trial Chamber III, Judgment pursuant to article 74 of the Statute (21 March 2016) ICC-01/05-01/08.

Trial Chamber III, Decision on sentence pursuant to article 76 of the Statute (21 June 2016) ICC-01/05-01/08.

Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute (7 April 2015) ICC-01/04-02/12 A.

Appeals Chamber, 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"' (8 June 2018) ICC-01/05-01/08 A.

*Prosecutor v Germain Katanga*

Pre-Trial Chamber I, Warrant of arrest for Germain Katanga (2 July 2007) ICC-01/04-01/07.

Pre-Trial Chamber I, Decision on the joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui (10 March 2008) ICC-01/04-01/07.

Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons,' (27 March 2013) ICC-01/04-01/07 OA 13.

Trial Chamber II, Judgment pursuant to article 74 of the Statute, (7 March 2014) ICC-01/04-01/07.



Appeals Chamber, Defence notice of discontinuance of appeal against the '*Judgment rendu en application de l'article 74 du statut*' rendered by Trial chamber II on 7 April 2014 (25 June 2014) ICC-01/04-01/07.

Appeals Chamber, Notice of discontinuance of prosecution's appeal against the article 74 judgment of conviction of Trial chamber II dated 7 March 2014 in relation to Germain Katanga (25 June 2014) ICC-01/04-01/07.

Decision on the review concerning reduction of sentence of Mr. Germain Katanga (13 November 2015) ICC-01/04-01/07.

*Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*

Pre-Trial Chamber I, Decision on evidentiary scope of the confirmation hearing preventive relocation and disclosure under article 67(2) of the Statute and Rule 77 of the Rules (25 April 2008) ICC-01/04-01/07.

Pre-Trial Chamber I, Decision on Prosecution's urgent application for the admission of the evidence of witnesses 132 and 287 (28 May 2008) ICC-01/04-01/07.

Pre-Trial Chamber I, Decision on the confirmation of charges, (30 September 2008) ICC-01/04-01/07.

Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the oral decision of Trial Chamber II of 12 June 2009 on the admissibility of the case (25 September 2009) ICC-01/04-01/07 OA 8.

Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the court and severing the charges against the accused persons (21 November 2012) ICC-01/04-01/07.

*Prosecutor v Callixte Mbarushimana*

Pre-trial Chamber I, Warrant of arrest for Callixte Mbarushimana (28 September 2010) ICC-01/04-01/10.10.

Appeals chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled Decision on the confirmation of charges, Appeals Chamber ICC-01/04-01/10-514 (30 May 2012)

Pre-Trial Chamber I, Decision on the confirmation of charges (16 December 2011) ICC-01/04-01/10.

The Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges' (30 May 2012) ICC-01/04-01/10 OA 4.

*Prosecutor v Francis Kirmi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*

Pre-Trial Chamber II, Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute, (30 May 2011) ICC-01/09-02/11.

Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012) ICC-01/09-02/11.

Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the Government of Kenya Challenging the Admissibility of the case pursuant to article 19(2)(b) of the Statute’ (30 August 2011) ICC-01/09-02/11 OA.

*Prosecutor v Bosco Ntaganda*

Pre-Trial Chamber I, Warrant of arrest (22 August 2006) ICC-01/04-02/06.

Pre-Trial Chamber II, Decision on the Prosecutor’s application under article 58 (13 July 2012) ICC-01/04-02/06.

Pre-Trial Chamber II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda (9 June 2014) ICC-01/04-02/06.

*Prosecutor v Dominic Ongwen*

Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen (23 March 2016) ICC-02/04-01/15.

*Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*

Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute’ (30 August 2011) ICC-01/09-01/11 OA.

## **Office of the Prosecutor of the ICC**

2004 Regulations of the Court ICC-BD/01-01-04 available at [https://www.icc-cpi.int/NR/rdonlyres/.../Regulations\\_of\\_the\\_Court\\_170604EN.pdf](https://www.icc-cpi.int/NR/rdonlyres/.../Regulations_of_the_Court_170604EN.pdf) (accessed on 15 March 2016).

2005 Rules of Procedure and Evidence available at <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf> (accessed on 25 March 2016).

2006 OTP, Report on activities performed during the first three years (June 2003 – June 2006), 12 September 2006, available at [https://www.icc-cpi.int/NR/rdonlyres/.../OTP\\_3yearreport20060914\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/.../OTP_3yearreport20060914_English.pdf) (accessed on 1 November 2016).

2006 OTP, Report on Prosecutorial Strategy (14 September 2006) available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2006> (accessed on 1 November 2016).

2009 ICC, Regulations of the Office of the Prosecutor (23 April 2009) ICC-BD/05-01-09.

- 2010 Prosecutorial Strategy, 2009-2012 (1 February 2010) available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2010> (accessed on 1 November 2016).
- 2010 ICC-ASP ‘Report of the Bureau on stocktaking: Complementarity. Taking stock of the principle of complementarity: bridging the impunity gap.’ (18 March 2010) available at [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/.../ICC-ASP-8-51-ENG.pdf](https://asp.icc-cpi.int/en_menus/asp/complementarity/.../ICC-ASP-8-51-ENG.pdf) (accessed on 11 November 2016).
- 2011 International Criminal Court (ICC), Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: <http://www.refworld.org/docid/4ff5dd7d2.html> (accessed on 25 October 2016).
- 2012 Presidency, Decision assigning the situation in the Republic of Mali to Pre-Trial Chamber II (19 July 2012) ICC-01/12.
- 2013 ICC-OTP, Policy Paper on Preliminary Examinations (1 November 2013) available at [https://www.icc-cpi.int/iccdocs/otp/OTP\\_Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP_Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) (accessed on 31 October 2016).
- 2013 ICC-OTP, Strategic Plan June 2012 – 2015 (11 October 2013) available at <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> (accessed 11 November 2016).
- 2014 ICC, Policy Paper on Sexual and Gender-Based Crimes (June 2014) available at [www.icc-cpi.int/.../OTP-Policy-Paper-on-Sexual-and-Gender-Based-Cri...](http://www.icc-cpi.int/.../OTP-Policy-Paper-on-Sexual-and-Gender-Based-Cri...) (accessed on 25 October 2016).
- 2014 OTP, Situation in the Central African Republic II, Article 53(1) Report (24 September 2014) available at [https://www.icc-cpi.int/iccdocs/otp/Art\\_53\\_1\\_Report\\_CAR\\_II\\_24Sep14.pdf](https://www.icc-cpi.int/iccdocs/otp/Art_53_1_Report_CAR_II_24Sep14.pdf) (accessed on 31 October 2016).
- 2015 ICC-OTP, Strategic Plan| 2016-2018 (6 July 2015) available at [https://www.icc-cpi.int/.../070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/.../070715-OTP_Strategic_Plan_2016-2018.pdf) (accessed 11 November 2016).
- 2016 ICC-OTP, Policy Paper on Case Selection and Prioritisation (15 September 2016) available at [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) (accessed on 7 November 2016).
- 2016 ICC Assembly of State Parties, Report of the Committee on Budget and Finance on the work of its Twenty-seventh Session (28 October 2016) ICC-ASP 15/15.
- International Criminal Court regarding Kenya’s proposed amendments, available at <http://scribd.com/doc/183221222/kenya-s-proposed-agenda-items-for-the-12th-Session-of-the-Assembly-of-State-Parties> (accessed on 28 May 2016).

## International Court of Justice

Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), Merits Judgment of 14 February 2002, [2002] ICJ Reports 3.  
Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 4 June 2008.

### **Special Court for Sierra Leone**

Appeals Chamber, The Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction, SCSL-2003-01-I, 31 May 2004.  
Statute of the Special Court for Sierra Leone, art 6(2), 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246, appendix II

### **ECOWAS Community Court of Justice**

Dorothy Chioma Njemanze & 3 Others v The Federal Republic of Nigeria,  
ECW/CCJ/APP/17/14/ECN/CCJ/JUD/08/17 (12 October 2017).

### **African Union**

- 1981 African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), (entered into force 21 October 1986) available at <https://www1.umn.edu/humanrts/instree/z1afchar.htm> (accessed on 12 April 2016).
- 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), (entered into force Jan. 25, 2004) available at [www.peacewomen.org/.../hr\\_protocoltotheafricancharteronhumanandpe...](http://www.peacewomen.org/.../hr_protocoltotheafricancharteronhumanandpe...) (accessed on 12 April 2016).
- 2000 Constitutive Act of the African Union, OAU Doc CAB/LEG/23.15, adopted on 11 July 2000 (entered into force 26 May 2001).
- 2003 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003 (entered into force 25 November 2005) available at [www.achpr.org/instruments/women.protocol/](http://www.achpr.org/instruments/women.protocol/) (accessed on 18 April 2016).
- 2003 Protocol on Amendments to the Constitutive Act of the African Union, adopted on 11 July 2003 available at [www.refworld.org/docid/493fe67d2.html](http://www.refworld.org/docid/493fe67d2.html) (accessed on 18 April 2016).
- 2004 Assembly of the African Union, Third Ordinary Session, 6-8 July 2004, Addis Ababa, Ethiopia, Decision on the seats of the African Union, Assembly/AU/Dec. 45(III) Rev. 1
- 2005 Assembly of the African Union, Fifth Ordinary Session, 4 – 5 July 2005, Sirte, Libya, Decision on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union – Assembly/AU/6(v)

- 2008 The Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 1 July 2008.
- 2009 Assembly/AU/DEC. 213(XII), Assembly of the African Union, Decision on the implementation of the Assembly decision on the abuse of the principle of Universal jurisdiction, Doc Assembly/AU/3(XII), Twelfth Ordinary Session, 1-3 February 2009, Addis Ababa, Ethiopia.
- 2009 Assembly/AU/Dec.245(XIII) Rev 1, Assembly of the African Union, Decision on the meeting of African States Parties to the Rome Statute of the ICC, Doc. Assembly/AU/13(XIII), Thirteenth Ordinary Session, 1-3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya.
- 2010 Decision on the Status of Signatures and Ratification of OAU/AU Treaties EX.CL/605(XVII), Ex.CL/Doc.571(XVII), adopted by the Seventeenth Ordinary Session of the Executive Council in Kampala, Uganda, on 25 July 2010.
- 2010 Assembly/AU/Dec.292 (XV), Decision of the abuse of the principle of Universal Jurisdiction, Doc. EX.CL/606(XVII), Assembly of the African Union, Fifteenth Ordinary Session, 25-27 July 2010, Kampala, Uganda.
- 2012 Meeting of Government Experts and Ministers of Justice/Attorneys, General on Legal Matters 7 to 11 and 14 to 15 May 2012, Addis Ababa, Ethiopia, 'Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,' Exp/Min/IV/Rev.7.
- 2014 Decision on the Draft Legal Instruments, Dec Assembly/AU/8(XXIII), Decision no Assembly/AU/Dec 529(XXIII), (26-27 June 2014).
- 2014 The Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 27 June 2014.
- 2014 Executive Council Twenty-Fifty Ordinary Session, 20 -24 June 2014, Malabo, Equatorial Guinea, EX.CL/846(XXV), The Report, The Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, Consideration of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.
- 2014 Final report of the African Commission of inquiry on South Sudan (15 October 2014) available at <https://paanluelwel2011.files.wordpress.com/2015/10/final-report-full-report.pdf> (accessed on 20 February 2017).

2017 African Union, Draft 2 Withdrawal strategy document (12 January 2017) available at [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf) (accessed on 16 February 2017).

Proposed agenda items for the 12<sup>th</sup> session of the Assembly of state parties of the International Criminal Court regarding Kenya's proposed amendments, available at <http://scribd.com/doc/183221222/kenya-s-proposed-agenda-items-for-the-12th-Session-of-the-Assembly-of-State-Parties> (accessed on 28 May 2016).

2018 African Union, Assembly, Thirtieth Ordinary Session, 'Decision on the International Criminal Court, Doc. EX.CL/1068 (XXXII)', (28-29 January 2018) Assembly/AU/Dec. 672(XXX),

## NGO's

Women's Caucus for Gender Justice 'Toward the Tokyo Tribunal 2000 and public hearing on crimes against women' available at [www.iccwomen.org>Tokyo Tribunal](http://www.iccwomen.org/Home>Tokyo_Tribunal) (accessed on 16 January 2015).

Amnesty International 'Malabo Protocol, Legal and institutional implications of the merged and expanded African Court' available at <https://www.amnesty.org/download/.../AFR0130632016ENGLISH.PDF> (accessed on 2 May 2016).

Avocats Sans Frontieres 'Case study, The application of the Rome Statute of the International Criminal Court by the courts of the Democratic Republic of Congo available at [www.asf.be/wp-content/.../ASF\\_CaseStudy\\_RomeStatute\\_Light\\_PagePerPage.pdf](http://www.asf.be/wp-content/.../ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf) (accessed on 10 October 2016).

Coalition for the International Criminal Court 'Report of the twelfth session of the Assembly of State Parties to the Rome Statute' (2013) p 20 available at [www.iccnw.org/documents/asp12\\_report.pdf](http://www.iccnw.org/documents/asp12_report.pdf) (accessed on 29 May 2016).

Coalition for the International Criminal Court 'Africa and the International Criminal Court', available at [http://www.iccnw.org/documents/Africa\\_and\\_the\\_icc.pdf](http://www.iccnw.org/documents/Africa_and_the_icc.pdf) (accessed on 29 June 2016).

Coalition for an effective African Court on Human and Peoples' Rights et al 'Implications of the African Court of Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity and war crimes' available at

- [http://www.africancourtcoalition.org/images/docs/submissions/opinion\\_african\\_court\\_extension\\_jurisdiction.pdf](http://www.africancourtcoalition.org/images/docs/submissions/opinion_african_court_extension_jurisdiction.pdf) (accessed on 16 February 2017).
- FIDH International Federation for Human Rights ‘Practical guide, The African Court on Human and Peoples’ Rights toward the African Court of Justice and Human Rights available at [https://www.fidh.org?img?pdf/african\\_court\\_guide.pdf](https://www.fidh.org?img?pdf/african_court_guide.pdf) (accessed on 15 April 2016).
- FIDH The Office of the Prosecutor of the International Criminal Court nine years on: Analysis of the prosecutorial strategy and policies of the Office of the Prosecutor (2003 -2011) recommendations to the next international criminal Prosecutor (December 2011) available at <https://www.fidh.org/IMG/pdf/cpiproc579ang.pdf> (accessed on 1 November 2016).
- FIDH Statement on the Prosecutorial Strategy of the Office of the Prosecutor of the International Criminal Court, 26 September 2006 available at <https://www.fidh.org/> (accessed on 1 November 2016).
- Human Rights Watch ‘Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath’ Human Rights Watch/Africa. Human Rights Watch Women’s Rights Project, Federation Internationale des Ligues des Droits de L’Homme, (New York: Human Rights Watch, 1996)
- Human Rights Watch ‘Seeking justice: The prosecution of sexual violence in the Congo war’ (March 2005) available at <https://www.hrw.org/sites/default/files/reports/drc0305.pdf> (accessed on 6 January 2015).
- Human Rights Watch ‘Q&A: The case of Hissene Habre before the Extraordinary African Chambers in Senegal’ available at <https://www.hrw.org/.../qa-case-hissene-habre-extraordinary-african-chambers-senega> (accessed on 14 February 2016).
- Human Rights Watch ‘ICC: Trial of Bosco Ntaganda for Congo crimes’ available at <https://www.hrw.org/news/2015/09/01/icc-trial-bosco-ntaganda-congo-crimes> (accessed on 26 July 2016).
- Human Rights Watch ‘The war within the war, sexual violence against women and girls in eastern Congo’ (June 2002) available at: <https://www.hrw.org/reports/2002/drc/Congo0602.pdf> (accessed on 30 August 2016).
- Human Rights Watch ‘Courting history: The landmark International Criminal Court’s first years’ available at <https://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf> (accessed on 1 November 2016).
- Human Rights Watch ‘South Sudan events of 2015’ available at <https://www.hrw.org/world-report/2016/country-chapters/south-sudan> (accessed on 20 February 2017).

Human Rights Watch ‘AU's 'ICC Withdrawal Strategy' Less than Meets the Eye’ available at <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye> (accessed on 20 February 2017).

Human Rights Watch ‘Justice on trial: Lessons from the Minova rape case in the Democratic Republic of Congo (October 2015) available at [www.refworld.org/docid/560d06c34.html](http://www.refworld.org/docid/560d06c34.html) (accessed on 12 April 2017).

International Bar Association ‘Sexual violence in Darfur’ (2015) available at [www.ibanet.org/Article/NewDetail.aspx?ArticleUid=8be55dc6-54c1-47ed-a7d8](http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=8be55dc6-54c1-47ed-a7d8) (accessed on 18 February 2017).

ICTJ Magistrates discuss dual jurisdiction of military and civilian courts over international crimes in DRC (September 2015) available at <https://www.ictj.org/news/drc-magistrates-discuss-dual-jurisdiction-military-civilian-courts-international-crimes> (accessed on 28 June 2016).

ICTJ The accountability landscape in eastern DRC: Analysis of the national legislative and judicial response to international crimes (2009 – 2014) available at <https://www.ictj.org/publication/accountability-landscape-eastern-drc-analysis-national-legislative-and-judicial-response> (accessed on 16 March 2017)

Open Society Foundations ‘Putting complementary into practice: Domestic justice for international crimes in DRC, Uganda and Kenya (2011) available at <https://www.opensocietyfoundations.org/.../putting-complementarity-into-practice-20> (accessed on 7 April 2017).

Open Society Foundations ‘Justice in DRC: Mobile Courts Combat rape and impunity in eastern Congo’ (January 2013) available at <https://www.opensocietyfoundations.org/sites/default/files/justice-drc-20130114.pdf> (accessed on 7 April 2017).

Women’s Initiative for Gender Justice (2012) ‘Gender report card on the International Criminal Card.’

Women’s Initiatives for Gender Justice ‘Special advisor on gender completes her mandate’ (2016) available at [www.4genderjustice.org/pub/Special-Adviser-on-Gender-completes-her-mandate.pdf](http://www.4genderjustice.org/pub/Special-Adviser-on-Gender-completes-her-mandate.pdf) (accessed on 19 May 2016).

The Fourth World Conference on Women, Beijing Declaration and Platform for Action 1995

## **Domestic Legislation and Government Papers**

### **Burkina Faso**



Decree no 2009-894/Pres promulguant la Loi no 052-2009/AN, portant détermination des compétences et de la procédure de mise en œuvre du statut de Rome relatif à la Cour pénale internationale par les juridictions Burkinabe.

Crimes against humanity, war crimes, genocide and related offences Bill, 2012 available at [www.pgaction.org/.../CRIMES-AGAINST-HUMANITY-WAR-CRIMES-GENOCIDE](http://www.pgaction.org/.../CRIMES-AGAINST-HUMANITY-WAR-CRIMES-GENOCIDE) (accessed 14 February 2017).

## **Democratic Republic of Congo**

Constitution of the Republic of the Democratic Republic of Congo amended by Law No 11/002 of 20 January 2011 revising certain articles of the Constitution of the Democratic Republic of Congo of 18 February 2006.

Code Penal Congolais Décret du 30 janvier 1940 tel que modifié et complété à ce jour Mis à jour au 30 novembre 2004.

Loi n° 023/2002 du 18 Novembre 2002 Portant Code Judiciaire Militaire available at [http://www.leganet.cd/Legislation/Droit Judiciaire/Loi.023.2002.18.11.2002.pdf](http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf) (accessed on 16 March 2017).

Loi N° 024/2002 du 18 novembre 2002 Portant Code Penal Militaire available at [www.leganet.cd/Legislation/.../Loi.024.2002.18.11.2002.pdf](http://www.leganet.cd/Legislation/.../Loi.024.2002.18.11.2002.pdf) (accessed on 16 March 2017).

Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais available at [www.leganet.cd/Legislation/DroitPenal/Loi.06.018.20.07.3006.htm](http://www.leganet.cd/Legislation/DroitPenal/Loi.06.018.20.07.3006.htm) (accessed on 16 March 2017).

Loi n° 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais available at [www.leganet.cd/Legislation/DroitPenal/L.06.019.20.07.2006.htm](http://www.leganet.cd/Legislation/DroitPenal/L.06.019.20.07.2006.htm) (accessed on 16 March 2017).

Loi organique n°13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire available at <http://www.leganet.cd/Legislation/Droit%20Judiciaire/LOI.13.011.11.04.2013.htm> (accessed on 16 March 2017).

Office Journal of the Democratic Republic of Congo, Office of the President of the Republic (29 February 2016).

Loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code penal.

Loi n° 15/023 du 31 décembre 2015 modifiant la Loi n° 024-2002 du 18 novembre 2002 portant Code pénal militaire

Loi n° 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 06 août 1959 portant Code de procédure pénale.

Republique Democratique du Congo, Justice Militaire Cour Militaire Sud-Kivu, RP 0105/2017

Republic Democratique du Congo, Justice Militaire Cour Militaire Du Sud-Kiv, RP no 093/016, RMP No 1625/BMG/016

## **Nigeria**

Constitution of the Federal Republic of Nigeria, 1999 as amended.

## **South Africa**

Republic of South Africa, No. 27 of 2002: Implementation of the Rome Statute of the International Criminal Court Act, 2002.

The Minister of Justice and Constitutional Development v The Southern African Litigation Centre (867/15) [2016] ZASCA 17 (15 March 2016)

Southern African Litigation Centre v Minister of Justice and Constitutional Development & Others (27740/2015) [2015] ZAGPPHC 402; Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre (867/15) [2016] ZASCA17 (15 March 2016).

## **Internet sources & Newspaper articles**

Valerie Amos, former under-secretary for Humanitarian Affairs and Emergency Relief Coordinator ‘Remarks to the global summit to end sexual violence in conflict – ministerial dialogue on the hidden victims of sexual violence (12 June 2014) available at <http://reliefweb.int/report/world/under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-valerie-5> (accessed on 2 January 2015)

United Nations Human Rights, Office of the High Commissioner ‘Rape as a weapon of war’ available at <http://www.ohchr.org/EN/NewsEvents/Pages/RapeWeaponWar.aspx> (accessed 6 January 2015).

Trials of War Criminals before the Nuernberg Military Tribunals, Volume II, ‘The Medical Case’, ‘The Milch Case’ available at [www.ioc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals-Vol-II.pdf](http://www.ioc.gov/rr/frd/Military_Law/pdf/NT_war-criminals-Vol-II.pdf) (accessed on 12 January 2015).

Interview with Margot Wallstrom, former Special Representative of the Secretary-General on Sexual Violence in Conflict (11 Nov 2010) available at [www.un.org/apps/news/newsmakers.asp?NewsID=26](http://www.un.org/apps/news/newsmakers.asp?NewsID=26) (accessed on 12 January 2015).

Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with commission resolution 1997/444 (26 January 1998) UN Doc.E/CN.4/1998/54 available at [www.ohchr.org>...>Your Human Rights>Women>SR Women](http://www.ohchr.org>...>Your Human Rights>Women>SR Women) (accessed on 12 January 2015).

UNSC ‘Security Council adopts text urging targeted sanctions against perpetrators of sexual violence during armed conflict’ (June 2013) available at [www.un.org/News/Press/docs/2013/sc/1043.doc.htm.sc/1043](http://www.un.org/News/Press/docs/2013/sc/1043.doc.htm.sc/1043) (accessed on 14 January 2015).

The influence of the Nuremberg Trial on international criminal law... available at [www.robertjackson.org>...>Speeches Related To Robert H. Jackson](http://www.robertjackson.org>...>Speeches Related To Robert H. Jackson) (accessed on 14 January 2015).

Women’s International War Crimes Tribunal 2000 for the Trial of Japan’s Military Sexual Slavery, In the matter of The Prosecutors and the Peoples of the Asia-Pacific Region v Emperor Hirohito et al. and the Government of Japan, Summary of findings (12 December 2000) <http://www.home.att.ne.jp/star/tribunal/jedgement-e.html> (accessed on 14 January 2015).

Caseinformation Sheet, Kunarac, Kovac & Vukovic available at [www.icty.org/x/cases/kunarac/cis/en/ciskunaracalen.pdf](http://www.icty.org/x/cases/kunarac/cis/en/ciskunaracalen.pdf) (accessed on 14 January 2015).

Per Incurium Law & Legal Definition. <http://www.definitions.uslegal.com > Legal Definitions Home > P> (accessed on 14 January 2015).

IOL ‘Al-Bashir pressured over ‘heinous crimes’ (5 March 2014) available at [www.io.co.za/news/.../al-bashir-pressured-over-heinous-crimes-1.16565](http://www.io.co.za/news/.../al-bashir-pressured-over-heinous-crimes-1.16565)... (accessed on 19 January 2015).

African group of States – ICC available at <https://www.icc.cpi.int/.../states%20parties/african%20states/.../african%20>... (accessed on 20 January 2015).

Member States| African Union [www.au.int/en/member\\_states](http://www.au.int/en/member_states) (accessed on 20 January 2015).

Kenya Parliament votes to withdraw from the ICC (5 September 2013) available at [www.aljazeera.com/news/africa/2013/09/201395151027359326.html](http://www.aljazeera.com/news/africa/2013/09/201395151027359326.html) (accessed on 20 January 2015).

- Women's International War Crimes Tribunal 2000 for the Trial of Japan's Military Sexual Slavery, In the matter of The Prosecutors and the Peoples of the Asia-Pacific Region v Emperor Hirohito et al. and the Government of Japan, Summary of findings, 12 December 2000 para 20 available at [http://www.alpha-canada.org/.../themes/.../theme/.../WomenTribunal\\_Summary ...](http://www.alpha-canada.org/.../themes/.../theme/.../WomenTribunal_Summary...) (accessed on 20 January 2015).
- Coalition for the International Criminal Court 'Reflections on the African Union ICC relationship' available at [www.iccnw.org/documents/CivSocdocreAUSummit.pdf](http://www.iccnw.org/documents/CivSocdocreAUSummit.pdf) (accessed on 22 January 2015).
- Situations and Cases – ICC available at [www.icc-cpi.int/.../situations%20and%20cases/...situations%20and%20c...](http://www.icc-cpi.int/.../situations%20and%20cases/...situations%20and%20c...) (accessed on 22 January 2015).
- Gender-based violence in the world of work: Overview and selected annotated bibliography, available at [www.ilo.org/wcmsp5/groups/public/-.../.../wcms\\_155763.pdf](http://www.ilo.org/wcmsp5/groups/public/-.../.../wcms_155763.pdf) (accessed on 2 February 2015).
- UNSC, Letter dated 7 June 2013 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary General, para. 3, S/2013/335 available at [www.un.org/ga/search/view\\_doc.asp?symbol=/2013/335](http://www.un.org/ga/search/view_doc.asp?symbol=/2013/335) (accessed on 4 February 2015).
- Statement of Special Representative of the Secretary-General on sexual violence in armed conflict, Zainab Hawa Bangura, Security Council open debate on sexual violence in conflict (17 April 2013) available at [www.peacewomen.org/.../security-council-open-debate-on-sexual-violence-in](http://www.peacewomen.org/.../security-council-open-debate-on-sexual-violence-in) (accessed on 4 February 2015).
- Implementation of the Rome Statute available at [www.iccnw.org>...>Ratification and Implementation](http://www.iccnw.org>...>Ratification and Implementation) (accessed on 4 February 2015).
- Jeanne Ward 'If not now, when? Addressing gender-based violence in refugee, internally displaced, and post-conflict settings' (2002) available at [www.thrc.org/resources/ifnotnow.pdf](http://www.thrc.org/resources/ifnotnow.pdf) (accessed on 4 February 2015).
- Women's Initiatives for Gender Justice, Is the international community abandoning the fight against impunity? available at [www.iccwomen.org/news/docs/WI-WomVoices3.../WomVoices3-15.ht...](http://www.iccwomen.org/news/docs/WI-WomVoices3.../WomVoices3-15.ht...) (accessed on 17 February 2015).
- BBC news 'Hissene Habre:Chad's ex-ruler convicted of crimes against humanity' available at [www.bbc.com/news/world-africa-36411466](http://www.bbc.com/news/world-africa-36411466) (accessed on 14 February 2016).
- Human Rights Watch 'Q&A: The case of Hissene Habre before the Extraordinary African Chambers in Senegal' available at <https://www.hrw.org/.../qa-case-hissene-habre-extraordinary-african-chambers-senega> (accessed on 14 February 2016).

Redated version of confidential letter submitted to the Office of the Prosecutor, written by Brigid Inder, Executive Director of Women's Initiatives for Gender Justice to Luis Moreno Ocampo, Chief Prosecutor of the ICC available at [http://www.iccwomen.org/documents/Prosecutor\\_Letter\\_August\\_2006\\_Redated.pdf](http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redated.pdf) (accessed on 5 March 2016).

Gender Report Card 2009, available at [www.iccwomen.org/publications](http://www.iccwomen.org/publications) (accessed on 5 March 2016).

DR Congo: ICC charges raise concern, joint letter from various human rights organisations to Luis Moreno Ocampo, Chief Prosecutor of the ICC available at <http://www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern> (accessed on 5 March 2016).

Inder B 'Reflection: Gender issues and child soldiers- The case of Prosecutor v Thomas Lubanga Dyilo' available at [www.ijmonitor.org/.../reflection-gender-issues-and-child-soldiers-the-case...](http://www.ijmonitor.org/.../reflection-gender-issues-and-child-soldiers-the-case...) (accessed 8 March 2016).

Interview with Fatou Bensouda, ICC Deputy Prosecutor available at [www.ijmonitor.org/.../interview-with-fatou-bensouda-icc-deputy-prosec...](http://www.ijmonitor.org/.../interview-with-fatou-bensouda-icc-deputy-prosec...) (accessed on 10 March 2016).

Jacobs D 'The ICC Katanga Judgment: A commentary (part 2) Regulation 55 and the modes of liability' available at <https://dovjacobs.com/.../the-icc-katanga-judgment-a-commentary-part-2-regulation-5...> (accessed on 13 March 2016).

Current Judges – Biographical Notes available at <https://www.icc/.../the%20judges/Pages/judges.aspx> (accessed on 13 March 2016).

UN News Centre 'Tackling Sexual Violence must include prevention, ending impunity – UN Official' (April 2010) available at [www.un.org/apps/news/story.asp?NewsID=34502](http://www.un.org/apps/news/story.asp?NewsID=34502) (accessed on 15 March 2016).

The Office of the Prosecutor of the International ... ICC, available at [www.icc-cpi.int/.../icc/.../the%20office%20of%20the%20prosecutor%20](http://www.icc-cpi.int/.../icc/.../the%20office%20of%20the%20prosecutor%20) (accessed on 15 March 2016).

AMICC 'Proceedings before trial in the case of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui at the International Criminal Court' available at [www.amicc.org/docs/KatangaandNgudjolocc.pdf](http://www.amicc.org/docs/KatangaandNgudjolocc.pdf) (accessed on 15 March 2016).

Regulations of the Court ICC-BD/01-01-04 available at [https://www.icc-cpi.int/NR/rdonlyres/.../Regulations\\_of\\_the\\_Court\\_170604EN.pdf](https://www.icc-cpi.int/NR/rdonlyres/.../Regulations_of_the_Court_170604EN.pdf) (accessed on 15 March 2016).

DR Congo massacre may alter international law available at <http://www.Aljazeera.com/indepth/features/2014/02/dr-congo-massacre-may-alter-international-law-2014215122427499229.html> (accessed on 17 March 2016).

Office of the Prosecutors closing statements (Open Session), p 54, available at <http://www-icc-cpi.int/icc.docs/doc/doc1210316.pdf> (accessed on 25 March 2016).

Kevin Jon Heller ‘Another Terrible Day for the OTP’ available at [opiniojuris.org/2014/03/08/another-terrible-day-otp/](http://opiniojuris.org/2014/03/08/another-terrible-day-otp/) (accessed on 25 March 2016).

DRC: The forgotten rape capital of the world available at: <https://www.issafrica.org/iss-today/drc-the-forgotten-rape-capital-of-the-world> (accessed on 25 March 2016).

The international criminal justice and Africa, the state of play, Chapter 4, p 26 available at [www.ictj.org/international-crimes](http://www.ictj.org/international-crimes) (accessed on 18 April 2016).

SALC Handbook series ‘Justice for all: Realising the promise of the Protocol establishing the African Court on Human and Peoples’ Rights available at [www.southernafriclitigationcentre.org/.../Justice-for-all-Realising-the-Pr...](http://www.southernafriclitigationcentre.org/.../Justice-for-all-Realising-the-Pr...) (accessed on 2 May 2016).

Global Justice ‘ASP 14: Negotiating the 2016 International Criminal Court budget’ available at [https://iciccglobaljustice.wordpress.com/.../asp14\\_the\\_courts\\_budget\\_for\\_2...](https://iciccglobaljustice.wordpress.com/.../asp14_the_courts_budget_for_2...) (accessed on 14 May 2016).

United Nations ‘Security Council refers situation in Darfur, Sudan to Prosecutor of the International Criminal Court’ available at [www.un.org/press/en/2005/sc8351.doc.htm](http://www.un.org/press/en/2005/sc8351.doc.htm) (accessed on 25 May 2016).

BBC ‘UN urges Darfur war crimes trials’ available at [www.democraticunderground.com > Discuss > TopicForums > NationalSecurity](http://www.democraticunderground.com > Discuss > TopicForums > NationalSecurity) (accessed on 25 May 2016).

States parties to the Rome Statute of the International Criminal Court available at <https://asp-icc-cp.int/.../states%20parties/.../the%20states%20parties%20to%20the%20...> (accessed on 29 June 2016).

Gaeta P ‘Guest Post: The ICC changes its mind on the immunity from arrest of President Al Bashir, but it is wrong again’, available at <https://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-w> (accessed on 12 July 2016).

Daily Monitor ‘Africa’s longest serving leaders’, available at [www.monitor.co.ug > Home > News > World](http://www.monitor.co.ug > Home > News > World) (accessed on 18 July 2016).

Yahoo News 'Ex-warlord Katanga back on trial for war crimes in DR Congo' (6 May 2016) available at <https://www.yahoo.com/news/ex-warlord-katanga-back-trial-war-crimes-dr-192549793.html> (accessed on 25 July 2016).

Yahoo News 'Sudan's al-Bashir, attending Rwanda summit, defies the ICC' available at <https://news.yahoo.com/sudans-al-bashir-attending-rwanda-summit-defies-icc-183019> (accessed on 18 July 2016).

Global Justice 'What's happening in the ICC Ntaganda trial' available at <https://ciccglobaljustice.wordpress.com/.../whats-happening-in-the-icc-ntaganda-trial/> (accessed on 25 July 2016).

Askin K 'Katanga judgment underlines need for stronger ICC focus on sexual violence' available at [www.ijmonitor.org/.../katanga-judgment-underlines-need-for-stronger-icc-focus-on-s...](http://www.ijmonitor.org/.../katanga-judgment-underlines-need-for-stronger-icc-focus-on-s...) (accessed on 25 July 2016).

PGA 'PGA welcomes the enactment of the implementing legislation of the Rome Statute of the International Criminal Court by the Democratic Republic of Congo' available at <http://www.pgaction.org/news/pga-welcomes-enactment-drc-implementing.html> (accessed on 29 August 2016).

International Legal Assistance Consortium 'Rebuilding courts and trust: an assessment of the needs of the justice system in the Democratic Republic of Congo' (August 2009) available at: [www.uneca.org/sites/default/files/.../conflits\\_in\\_drc\\_eng\\_25sept\\_rev1.pdf](http://www.uneca.org/sites/default/files/.../conflits_in_drc_eng_25sept_rev1.pdf) (accessed on 30 August 2016).

Democratic Republic of the Congo: How did the colonialism affect the people in congo? available at <http://southwest.mpls.k12.mn.us/uploads/congocasestudy.pdf> (accessed on 30 August 2016)

Report of the Special Rapporteur, Yakin Erturk, on violence against women, its causes and consequences, UN Human Rights Council, A/HRC/7/6/Add.4 (28 February 2008) available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/7session/A.HRC.7.6.Add.4.doc> (accessed on 30 August 2016).

United Nations Human Rights 'Report of the mapping exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003' (2010) available at: [www.ohchr.org/Documents/Countries/.../DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](http://www.ohchr.org/Documents/Countries/.../DRC_MAPPING_REPORT_FINAL_EN.pdf) (accessed on 31 August 2016).

World without genocide 'Democratic Republic of Congo, 1996 to present' available at: [www.worldwithoutgenocide.org/.../Conflict-in-the-Democratic-Republic-of-the-Congo-Wo...](http://www.worldwithoutgenocide.org/.../Conflict-in-the-Democratic-Republic-of-the-Congo-Wo...) (accessed on 31 August 2016).



The Christian Science Monitor ‘A brief history of Congo’s wars’ (29 November 2011) available at [www.csmonitor.com/World/Africa/Africa.../2011/.../A-brief-history-of-Congo-s-wars](http://www.csmonitor.com/World/Africa/Africa.../2011/.../A-brief-history-of-Congo-s-wars) (accessed on 31 August 2016).

Jeffrey Gettleman ‘In Congo, wars are small and chaos is endless’ The New York Times (30 April 2016) available at: [www.nytimes.com/2016/05/.../africa/in-congo-wars-are-small-and-chaos-is-endless.html](http://www.nytimes.com/2016/05/.../africa/in-congo-wars-are-small-and-chaos-is-endless.html) (accessed on 31 August 2016).

Usalama Project Report: Understanding Congolese Armed Groups, Rift Valley Institute available at: [www.eprints.lse.ac.uk/.../Vlassenroot\\_South\\_Kivu\\_identity\\_territory\\_and\\_power\\_in\\_easter](http://www.eprints.lse.ac.uk/.../Vlassenroot_South_Kivu_identity_territory_and_power_in_easter) (accessed on 2 September 2016).

The Global and Inclusive Agreement on Transition in the Democratic Republic of Congo (Pretoria Agreement) was signed in Pretoria on 16 December 2002 available at: [www.peacemaker.un.org/drc-agreementontransition2002](http://www.peacemaker.un.org/drc-agreementontransition2002) (accessed on 2 September 2016).

Libya – Coalition for the International Criminal ICC, available at [www.iccnw.org/?mod=Libya](http://www.iccnw.org/?mod=Libya) (accessed on 31 October 2016).

All Cases – ICC, available at [www.icc.cpi.int/.../icc/situations%20and%20cases/cases/.../cases%20index](http://www.icc.cpi.int/.../icc/situations%20and%20cases/cases/.../cases%20index)... (accessed on 31 October 2016).

ICC – Libya, available at [www.icc.cpi.int/.../icc/situations%20and%20cases/.../icc0111/.../situation](http://www.icc.cpi.int/.../icc/situations%20and%20cases/.../icc0111/.../situation) (accessed on 31 October 2016).

ICC – The Office of the Prosecutor of the International Criminal Court opens its first investigation, 23 June 2004 available at [www.icc-cpi.int/.../item.aspx?...office...prosecutor...court+opens+its+first+investigation](http://www.icc-cpi.int/.../item.aspx?...office...prosecutor...court+opens+its+first+investigation).. (accessed on 31 October 2016).

ICC Case information sheet, The Prosecutor v Bosco Ntaganda available at <https://www.icc-cpi.int/drc/ntaganda/Documents/NtagandaEng.pdf> (accessed on 1 November 2016).

International Bar Association ‘Evidence matters in ICC trials’ (August 2016) available at [www.ibanet.org/Document/Default.aspx?DocumentUid=864b7fc6-0e93-4b2b..](http://www.ibanet.org/Document/Default.aspx?DocumentUid=864b7fc6-0e93-4b2b..) (accessed on 1 November 2016).

Glassborow K ‘ICC investigative strategy under fire’ available at <https://iwpr.net/global-voices/icc-investigative-strategy-under-fire> (accessed on 1 November 2016).



- Chowoo W ‘No yet case against UPDF at ICC – Hague’ (16 November 2015) available at <https://chowoo.wordpress.com/2015/11/16/no-yet-case-against-updf-in-icc-hague/> (accessed 7 November 2016).
- Katsimardon-Mirariti K ‘ICC Al-Bashir case: New decisions on non-cooperation’ (2016) available at <http://blog.casematrixnetwork.org/toolkits/eventsnews/news/icc-al-bashir-case-new-decisions-on-non-cooperation/> (accessed on 7 November 2016).
- Bensouda F ‘Gender justice and the International Criminal Court – Progress and reflections’ (14 February 2012) available at <https://www.icc-cpi.int/NR/.../StatementgenderSydney140212.pdf> (accessed on 10 November 2016).
- Bensouda F ‘The investigation and prosecution of sexual and gender-based crimes: reflections from the Office of the Prosecutor’ (24 August 2015) available at <https://www.hagueacademy.nl/.../Opening-keynote-speech-The-Hague-Academy-of-International-Law-Advanced-Course-on-International-...> (accessed on 10 November 2016).
- African Business Magazine ‘Who pays for the ICC?’ (2011) available at [www.africanbusinessmagazine.com/uncategorised/who-pays-for-the-icc/](http://www.africanbusinessmagazine.com/uncategorised/who-pays-for-the-icc/) (accessed 11 November 2016).
- Wouters J and Chan K ‘Policies, not politics: The pursuit of justice in prosecutorial strategy at the International Criminal Court’ (2012) available at [https://www.researchgate.net/.../251354817\\_Policies\\_Not\\_Politics\\_The\\_Pursuit\\_of\\_Justi](https://www.researchgate.net/.../251354817_Policies_Not_Politics_The_Pursuit_of_Justi). (accessed on 17 November 2016).
- Why African states are leaving the ICC available at [www.iol.co.za/news/africa/why-african-states-are-leaving-the-icc-2084346](http://www.iol.co.za/news/africa/why-african-states-are-leaving-the-icc-2084346) (accessed on 27 November 2016).
- Wanda M ‘Rights of women in Africa: Launch of petition to the African Union’ (3 June 2004) available at <http://www.pambazuka.org/gender-minorities/rights-women-africa-launch-petition-african-union> (accessed on 6 December 2016).
- Davenport D ‘International Criminal Court: 12 years, \$1 billion, 2 convictions’ (2014) available at [www.forbes.com/.../12/international-criminal-court-12-years-1-billion-2-convictions](http://www.forbes.com/.../12/international-criminal-court-12-years-1-billion-2-convictions) (accessed on 10 February 2017).
- Brundi officially informs UN of intent to leave ICC available at <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims> (accessed 10 February 2017).
- United Nations Reference: ‘C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification)’ available at <https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf> (accessed 10 February 2017).

Benin deposits article 34(6) Declaration available at [www.africancourtcoalition.org](http://www.africancourtcoalition.org) › In the News (accessed on 14 February 2017).

International Justice Resource Centre ‘Rwanda withdraws access to the African Court for individuals and NGO’s’ available at [www.ijrcenter.org/.../rwanda-withdraws-access-to-african-court-for-individuals-and-n](http://www.ijrcenter.org/.../rwanda-withdraws-access-to-african-court-for-individuals-and-n) (accessed on 14 February 2017).

Press conference by the President of the Assembly of States Parties, H. E. Mr Sidiki Kaba on the withdrawal from the Rome Statute, 24 October 2016 available at [https://asp.icc-cpi.int/iccdocs/.../PASP-PressConference\(24Oct2016\)-ENG-transcript.p](https://asp.icc-cpi.int/iccdocs/.../PASP-PressConference(24Oct2016)-ENG-transcript.p) (accessed on 14 February 2017)

Enough Project ‘Progress and challenges on conflict minerals: facts on Dodd-Frank 1502’ available at [www.enoughproject.org/files/Progress%20and%20Challenges.pdf](http://www.enoughproject.org/files/Progress%20and%20Challenges.pdf) (accessed on 14 February 2017).

African Union, Draft 2 Withdrawal strategy document available at [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf) (accessed on 16 February 2017).

Peace and Security Council – Wikipedia available at [https://en.wikipedia.org/wiki/Peace\\_and\\_Security\\_Council](https://en.wikipedia.org/wiki/Peace_and_Security_Council) (accessed on 16 February 2017).

AlJazeera ‘Thabo Mbeki: Justice cannot trump peace’ available at [www.aljazeera.com/.../thabo-mbeki-justice-cannot-trump-peace-2013112210658783...](http://www.aljazeera.com/.../thabo-mbeki-justice-cannot-trump-peace-2013112210658783...) (accessed on 18 February 2017).

The Citizen ‘SA pulling out of the International Criminal Court’ available at <http://citizen.co.za/news/news-national/1321724/sa-pulling-out-of-international-criminal-court/> (accessed on 20 February 2017).

Brundi officially informs UN of intent to leave ICC available at <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims> (accessed 10 February 2017).

South Africa’s instrument of withdrawal available at <https://www.justsecurity.org/wp-content/uploads/2016/10/South-Africa-Instrument-of-Withdrawal-International-Criminal-Court.jpg> (accessed on 10 March 2017).

Daily Maverick ‘Top SA jurists make the case for the ICC as SA withdraws its original notice of withdrawal’ available at <https://www.dailymaverick.co.za/.../2017-03-08-top-sa-jurists-make-the-case-for-the-i> (accessed on 10 March 2017).

- Newsweek ‘Why an African mass withdrawal from the ICC is possible’ available at [www.newsweek.com/icc-international-criminal-court-africa-gambia-south-africa-buru](http://www.newsweek.com/icc-international-criminal-court-africa-gambia-south-africa-buru) (accessed on 10 March 2017).
- Jollofnews ‘Gambia cancels withdrawal from the ICC’ available at <https://jollofnews.com/2017/02/13/gambia-cancels-withdrawal-from-the-international-criminal-court/> (accessed on 10 March 2017).
- Coalition for the International Criminal Court ‘Status of United States bilateral immunity agreement’ available at [http://www.iccnw.org/documents/CICCFS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf) (accessed on 14 March 2017).
- Fohrid Human Rights and Democratic Forum ‘International Criminal Court, article 98(2) and bilateral immunity agreement’ (2011) p 8 [www.fohrid.org.np/.../2-international-criminal-court-article-98-2-and-bilateral-immu](http://www.fohrid.org.np/.../2-international-criminal-court-article-98-2-and-bilateral-immu) (accessed on 14 March 2017).
- Radio Okapi ‘Fatou Bensouda: Ensemble, nous pouvons mettre fin à l’impunité’ (March 2014) available at <http://www.radiookapi.net/emissions-2/linvite-du-jour/2014/03/14/fatou-bensouda-ensemble-nous-pouvons-mettre-fin-limpunite/> (accessed on 14 March 2017).
- Institute for War and Peace Reporting ‘Sexual violence in the Democratic Republic of Congo’ (2008) available at <http://www.ceipaz.org/images/contenido/Sexual%20violence%20in%20the%20Democrat%20Republic%20of%20Congo.pdf> (accessed on 20 March 2017).
- The Informal experts group report on “The Principle of Complementarity in Practice”, commissioned by the OTP in 2003, 8 available at [www.icc-cpi.int/iccdocs/doc/doc6547324.PDF](http://www.icc-cpi.int/iccdocs/doc/doc6547324.PDF) (accessed on 20 April 2017).
- United Nations Office of the Special Representation of the Secretary-General for Sexual Violence in Conflict ‘DRC: Military pledge marks milestone on road to ending conflict related sexual violence (March 2015) available at [www.un.org/sexualviolenceinconflict/.../drc-military-pledge-marks-milestone-on-road](http://www.un.org/sexualviolenceinconflict/.../drc-military-pledge-marks-milestone-on-road) (accessed on 23 April 2017).
- Medical Definition of Zoophilia - MedicineNet available at [www.medicinenet.com/script/main/art.asp?articlekey=11824](http://www.medicinenet.com/script/main/art.asp?articlekey=11824) (accessed on 10 May 2017).
- Pan African Parliament wants Malabo Protocol reviewed available at <https://www.independent.co.ug> › AFRICA (accessed 10 May 2018).
- News 24 ‘Chibok girl refused to be part of release deal: Nigeria’ (May 2017) available at <http://www.news24.com/Africa/News/chibok-girl-refused-to-be-part-of-release-deal-nigeria-20170509> (accessed on 12 May 2017).

CNN ‘A rare inside look at the Chibok girls’ road to recovery’ (May 2017) available at [www.cnn.com/2017/05/11/africa/nigeria-chibok-girls-release-boko-haram/](http://www.cnn.com/2017/05/11/africa/nigeria-chibok-girls-release-boko-haram/) (accessed on 12 May 2017).

The War Crimes Research Office at the American University Washington College of Law *amicus curiae* brief ‘The Practice of Cumulative Charging before International Criminal Bodies’ February 2011 (Appeals Chamber) available at [www.legal-tools.org/doc/ad00a6/pdf/](http://www.legal-tools.org/doc/ad00a6/pdf/) (accessed on 2 June 2017).

2017 Budget Overview Paper – Pan African Parliament available at [www.panafricanparliament.org/.../documents...au-2017-budget-overview-paper.../file](http://www.panafricanparliament.org/.../documents...au-2017-budget-overview-paper.../file) (accessed 14 May 2018).

Max du Plessis and Dire Tladi ‘[The ICC’s immunity debate – the need for finality](#)’ (11 August 2017) available at <https://www.ejiltalk.org/author/dtladi/> (accessed 14 May 2018).

Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council: Special report of the events in Ituri January 2002 to December 2003, UN Doc. S/2004/573 (16 July 2007), paras 37, 80 and 108 available at [https://digitallibrary.un.org/record/527418/files/S\\_2004\\_573-EN.pdf](https://digitallibrary.un.org/record/527418/files/S_2004_573-EN.pdf) (accessed 14 July 2018),

Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo available at <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat> (accessed 20 July 2018).

Katy Glassborow ‘Special Report: Sexual violence in DRC, ICC investigative strategy under fire’ available at <https://iwpr.net/global-voices/icc-investigative-strategy-under-fire> (accessed on 31 July 2018).

Human Rights Watch ‘Uganda Events of 2005’ available at <https://www.hrw.org/world-report/2006/country-chapters/uganda> (accessed 10 August 2018).

Alex Whiting ‘Appeals judges turn the ICC on its head with Bemba decision’ (14 June 2018) available at <https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision> (accessed 29 August 2018).

Leila N Sadat ‘Fiddling while Rome Burns? The Appeals Chamber’s curious decision in Prosecutor v Jean-Pierre Bemba Gombo’ (12 June 2018) available at <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-deci...> (accessed 29 August 2018).

Michael Karnavas ‘The reversal of Bemba’s conviction: what went wrong or right?’ available at [michaelkarnavas.net/blog/2018/06/19/bemba-reversal](http://michaelkarnavas.net/blog/2018/06/19/bemba-reversal) (accessed 28 August 2018).

Susana Sacouto ‘The impact of the Appeals Chamber decision in Bemba: Impunity for sexual and gender based crimes?’ available at <https://www.ijmonitor.org/.../the-impact-of-the-appeals-chamber-decision-in-bemba-i...> (accessed 29 August 2018).

Angela Mudukuti ‘Judicial integrity and independence: The South African Omar Al Bashir matter’ available at [www.southernafrialitigationcentre.org/wp-content/.../GOAL-16-Book-Mudukuti.pdf](http://www.southernafrialitigationcentre.org/wp-content/.../GOAL-16-Book-Mudukuti.pdf) (accessed 18 September 2018).

Evaluation of UNDP’s support to mobile courts in Sierra Leone, Democratic Republic of Congo and Somalia available at [www.undp.org/.../undp/.../evaluation-of-undp-s-support-to-mobile-courts-in-drc--sier...](http://www.undp.org/.../undp/.../evaluation-of-undp-s-support-to-mobile-courts-in-drc--sier...) (accessed 19 September 2018).

FIDH ‘Victims of sexual violence rarely obtain justice and never receive reparation’ available at [https://www.fidh.org/IMG/pdf/rapport\\_rdc\\_.pdf](https://www.fidh.org/IMG/pdf/rapport_rdc_.pdf) (accessed 19 September 2018).

Trial International ‘Sexual violence in the DRC: Why is impunity so persistent?’ (12 October 2017) available at <https://trialinternational.org/.../sexual-violence-in-the-drc-why-is-impunity-so-persista...> (accessed 19 September 2018).

PHR ‘Barriers to justice: Implementing reparations for sexual violence in the DRC’ (2013) available at <http://physiciansforhumanrights.org/blog/barriers-to-justice-for-barriers-to-justice-for-survivors-of-sexual-violence-in-the-drc.html> (accessed 19 September 2018).

Michael Maye ‘Mobile courts in the Democratic Republic of Congo: Complementarity in action?’ available at [https://worldjusticeproject.org/.../mobile\\_courts\\_in\\_the\\_democratic\\_republic\\_of\\_cong...](https://worldjusticeproject.org/.../mobile_courts_in_the_democratic_republic_of_cong...) (accessed 19 September 2018).

Kavumu Case: Appeal opens near crimes venue available at <https://trialinternational.org/latest-post/kavumu-case-appeal-close-to-crimes-venue/> (accessed 19 September 2018).

The Kavumu trial: Complementarity in action in the Democratic Republic of Congo available at <https://www.ijmonitor.org/2018/02/the-kavumu-trial-complementarity-in-action-in-the-democratic-republic-of-congo/> (accessed 20 September 2018).

Trial International ‘Kavumu Trial: High military court confirms all condemnations’ (26 July 2018) available at <https://trialinternational.org/latest-post/kavumu-hmc-confirms-all-condemnations/> (accessed 20 September 2018).

DRC: Justice has spoken for the 150 victims of Musenyi available at <https://trialinternational.org/latest-post/drc-justice-has-spoken-for-the-150-victims-of-musenyi/> (accessed 20 September 2018).

## **LIST OF ACRONYMS**

ACJHR	African Court of Justice and Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACJHPR	African Court of Justice and Human and Peoples' Rights
AU	African Union
AMU	Arab Maghreb Union
BIA	Bilateral Immunity Agreement
CA	Constitutive Act of the African Union
CAR	Central African Republic
CEN-SAD	Community of Sahei-Saharan States
CCL 10	Control Council Law 10
COMESA	Common Market for Eastern and South Africa
DRC	Democratic Republic of Congo
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
FNI	Front de nationalistes et integrationnistes
FRPI	Force de resistance patriotique en Ituri
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IGAD	Intergovernmental Authority on Development
IHL	International Humanitarian Law
IMT	International Military Tribunal for Nuremberg
IMTFE	International Military Tribunal for the Far East
LRA	Lord's Resistance Army
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
Malabo Protocol	The Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

MONUSCO	United Nations Organization Stabilization Mission in the DRC
NGO	Non-Governmental Organisation
OAU	Organisation of the African Union
OHCHR	UN Office of the High Commissioner for Human Rights
OSU	Operation Support Unit
OTP	Office of the Prosecutor
PGA	Parliamentarians for Global Action
PSU	Protection Strategies Unit
RPE	Rules of Procedure and Evidence
REC	Regional Economic Community
SADC	Southern African Development Community
SGBC	Sexual and Gender-Based Crime
SGBV	Sexual and Gender-Based Violence
Protocol on ACJHR	Protocol on the Statute of the African Court of Justice and Human Rights
UNHROHC	United Nations Human Rights Office of the High Commissioner
UPDF	Ugandan People's Defence Force
VWS	Victim Witness Unit